Zurn/N.E.P.C.O. *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO *and* International Brotherhood of Carpenters and Joiners of America, Local Union 140, AFL–CIO *and* International Association of Bridge, Structural and Ornamental Iron Workers, Local 397, AFL–CIO *and* Lawrence Roberts, *and* United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, Local 624, AFL–CIO, CLC. Cases 12–CA–15833, 12–CA–16656, 12–CA–16661, 12–CA–16801, 12–CA–16381, 12–CA–16382, 12–CA–16418, and 12–CA–16860

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On November 2, 1995, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel and Charging Party Boilermakers filed exceptions and supporting briefs, and the Respondent filed briefs answering the parties' exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as discussed below, and to adopt the recommended Order.

The complaint in this case alleged several Section 8(a)(1) violations and the Respondent's unlawful refusal to hire and/or consider for hire a large number of union members at its construction sites in Auburndale, Bartow, and Mulberry, Florida.

The judge recommended dismissal of the complaint, essentially concluding that the evidence was insufficient to support any of the complaint allegations. We agree that the General Counsel has failed to establish that the Respondent violated the Act, but we add the following regarding the judge's findings concerning the Respondent's priority hiring policy.

The Respondent has had in effect since at least the late 1980s a hiring policy that gives preference to former employees of the Respondent and to employees referred by the Respondent's current managers, supervisors, and employees. The General Counsel argues that the Respondent's utilization of this policy in hiring employees to work at the three Florida jobsites involved in this case was unlawful because it gave advantage to nonunion applicants and screened out applicants likely to favor unionization. As the judge found, however, the policy does not on its face preclude or limit the possibilities for consideration of applicants with union preferences or backgrounds, and union members were in fact hired at the Auburndale site. For the reasons stated by the judge, we agree that the evidence presented is insufficient to support the General Counsel's theory that the policy as applied at the Florida jobsites unlawfully discriminated on the basis of union activities. We emphasize, however, that because of the manner in which this case was litigated, that is the only theory we pass on in dismissing the complaint.

As set forth by the judge in his decision, the General Counsel at trial consistently took the position that the Government's theory of the case was that Zurn's hiring policy had been unlawfully applied at the three Florida sites, and that it was not challenging the policy either as a general matter or as applied at other jobsites not identified in the complaint. The Charging Party has just as consistently argued that the policy itself is unlawful, both on the theory that it is a calculated and deliberate plan to discriminate against prounion job applicants which violates Section 8(a)(3), and on the theory that it is "inherently destructive" of Section 7 rights, under the rationale of *Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). As the judge correctly noted, however, it is well established that the General Counsel's theory of the case is controlling, and that a charging party cannot enlarge upon or change the General Counsel's theory. *Kimtruss Corp.*, 305 NLRB 710 (1991). Accordingly, in dismissing the complaint, we do not pass on either of the Charging Party's theories.

The General Counsel excepted to the judge's refusal to admit into evidence certain transcript excerpts and exhibits from Case 7–CA–33443 et al. (Cadillac case), an unfair labor practice proceeding involving the Respondent which was pending before Judge Karl H. Buschmann at the time the instant case was litigated, and which is currently pending before the Board. The General Counsel also excepted to the judge's grant of a petition to revoke

[1] The Respondent's motion to dismiss and/or strike the General Counsel's and the Charging Party's exceptions is denied as lacking in merit. Both sets of exceptions are in substantial compliance with Sec. 102.46 of the Board's Rules and Regulations, and the Charging Party's exceptions were in fact accepted as timely filed with the Board.

[2] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In affirming the judge's decision, we do not rely on his discussion in the sixth paragraph of sec. D of his decision of the alleged agency relationship between the Respondent and the Florida Job Service (FJS). We find it unnecessary to address the agency issue since the judge's credibility findings make it unnecessary to consider the significance of any actions by FJS that might be attributed to the Respondent.

[3] We note that, as the judge anticipated, subsequent to his decision, the Supreme Court issued its opinion in *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), in which the Court endorsed the Board's position, and the judge's finding in this case, that paid union organizers who seek employment with a statutory employer are employees within the meaning of Sec. 2(3) of the Act.

the General Counsel's subpoena to an expert witness who had testified for the Respondent in the Cadillac case, but who maintained that he knew nothing about the application of the Respondent's hiring policies at the job sites at issue in this case. The General Counsel has referred to all this material as "background animus." Given the scope of the theory actually litigated in this case, as discussed above, we deny the exceptions for the reasons stated by the judge in his Statement of the Case.

It is also noteworthy that, in view of the General Counsel's litigation theory, no significant factual connection has been shown between the two cases. The Respondent's personnel supervisors, Tom Brigham and Larry Sullivan, who played a significant role in the alleged unfair labor practices in the Cadillac case, played no such role in the instant case. Rather, the Respondent's personnel supervisor, B.J. Malone, who was *not* involved in the Cadillac case, was at the heart of the unfair labor practice allegations here. In addition, there is no significant evidence that employees hired by the Respondent in the Cadillac case, allegedly to avoid hiring applicants with prounion sympathies, were also hired in the instant case under the Respondent's preferential hiring policy.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Michael Maiman and *Joe Canfield, Esqs.,* for the General Counsel.

David Kresser, Esq. and *Kenneth A. Knox, Esq. (Fisher & Phillips),* of Atlanta, Georgia, and Fort Lauderdale, Florida, for the Respondent.

Michael J. Stapp, Esq. (Blake & Uhlig), of Kansas City, Kansas, for Charging Party Boilermakers.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. Reaching back to the legendary Joe Hill, the spiritual roots of this "salting" case run deep. As Boilermakers' organizer, Camilo Juncal, wrote on his October 5, 1993 employment application to Zurn, and as IBEW Local 915 organizer, Bill Dever, expressed it at trial, their duties are to "organize the unorganized."[1]

This salting case involves three construction jobsites of Zurn Nepco in Florida about 35 miles east of Tampa: **Auburndale, Bartow, and Mulberry.** When the Boilermakers and other unions tried to "salt" Zurn Nepco's three Florida construction jobsites in 1993–1994 (mostly with regular union members, but in some instances with paid, staff union organizers), Zurn did not hire the "salters." Arguing that Zurn illegally refused to hire the salters, the prosecutor (the NLRB's General Counsel)[2] alleges that Zurn, to maintain its nonunion status, has a national policy of hiring former employees and (among other priorities) referrals from supervisors which, as applied at the three Florida jobsites here, operated to hire nonunion employees and to exclude union workers. Defending its national hiring policy, Zurn argues that no worker is rejected because of his union status, and that there is nothing unlawful about assigning preferential hiring priorities to persons recommended by sources Zurn finds reliable (such as past or current experience as a Zurn employee, or recommended by a supervisor or other Zurn employee). Finding no merit to any of the Government's allegations, I dismiss the complaint in its entirety.

I presided at this 18-day trial in Tampa, Florida, beginning December 12, 1994, and closing May 10, 1995. Trial was pursuant to the December 7, 1994 order consolidating cases, second consolidated amended complaint and notice of hearing (the complaint), as amended during the hearing, issued by the General Counsel of the National Labor Relations Board (the Board) through the Regional Director for Region 12 of the Board.

The complaint is based on a charge filed October 8, 1993, in the lead case, Case 12–CA–15833, by the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO (Boilermakers or the Union), plus other later charges filed by the Boilermakers, Carpenters Local Union 140 (Carpenters or Local 140), Iron Workers Local Union 397 (Iron Workers or Local 397), Lawrence Roberts (Roberts), an individual, and Pipe Fitters Local 624 (Pipefitters or Local 624) against Zurn/N.E.P.C.O. (Zurn, the Company, or Respondent).

Two of the listed case numbers were added by amendments during the hearing. By order dated February 14, 1995 (GCX. 92, with GCX. 92a correcting the date), I granted the General Counsel's motion to amend the complaint to add the charge in Case 12–CA–16801 (GCX 4) to the others.[3] On January 13, 1995, Pipefitters Local 624 filed a charge (GCX 149) in Case 12–CA–16860. The charge was amended on April 21 (GCX 150) to allege that, since about November 2, 1994, Zurn had failed and refused to hire Glen Thornbury in violation of Section 8(a)(3) and (1) of the Act. By motion (GCX 153) dated May 2 the General Counsel sought to amend the complaint to insert, as complaint paragraph 12(e), the allegation that Zurn had refused to hire Thornbury since November 2, 1994.[4] When the General Counsel asserted that probably less than an hour would be needed for the Government's evidence respecting

[1] "'Heed this cry that comes from the hearts of men. Organize the Unorganized.'—John L. Lewis, 1935." Pete Seeger and Bob Reiser, "*CARRY* IT ON! A History in Song and Picture of America's Working Men and Women" 143 (1985, Simon & Schuster). The slogan "Organize the unorganized" has its spiritural origin in a farewell telegram from Joe Hill the night before his November 19, 1915 execution by a Utah firing squad. The memorable line from Hill's wire reads, "Don't waste time mourning. Organize!" "G. M. Smith," *Joe Hill* 172 (1969, 1984, Peregrine Smith Books); Edith Fowke & Joe Glazer, "Songs of Work and Protest" 21 (1960, 1973, Dover Publications). And Carl Sandburg quotes Joe Hill's farewell admonition in his 1936 poem, "The People, Yes," number 23. (And see fn. 9, below.)

[2] In an unfair labor practice trial, the General Counsel is cast in the role of a prosecutor. *Teamsters Local 722 (Kasper Trucking),* 314 NLRB 1016, 1017 fn. 9 (1994).

[3] Exhibits are designated GCX for the General Counsel's, RX for those of Respondent, and CPX for those of the Boilermakers. None of the other charging parties offered any exhibits. Actually, aside from a brief appearance during the final week by the Carpenters for a subpoena matter, none of the other charging parties participated at the hearing except as witnesses.

[4] By oversight, the General Counsel's motion respecting Thornbury was neither given an exhibit number nor offered in evidence at the hearing. Following close of the hearing the General Counsel, at my request, forwarded copies of the motion to the court reporter as GCX 153. I now receive GCX 153 in evidence.

Thornbury, Zurn had no objection and I granted the General Counsel's motion to add Thornbury. (16:3606.)[5]

Overall, the complaint alleges that Zurn violated Section 8(a)(3) of the Act concerning hiring, or considering for hire, at three Florida jobsites (**Auburndale, Bartow**, and **Mulberry**) beginning about August 1993. In addition to the individual allegations of discrimination, the complaint alleges that Zurn's admitted national hiring policy was applied, during the relevant time frame, "to avoid hiring union members and organizers." (Complaint par. 13.c) Complementing the hiring-policy allegation is a request for a remedial order national in scope.

When I questioned whether the requested remedy seemed broader than the allegation, the General Counsel moved to amend complaint paragraph 13(c) to add at the end of the allegation, "on a nationwide basis and that the policies described above unlawfully promote a discriminatory preference for nonunion members." (GCX 3; 1:119; 6:1189.) Additionally, on the second day of trial the Charging Party Boilermakers filed a new charge (GCX 4), docketed as Case 12–CA–16801, alleging that since 6 months prior to the date of the filing of the charge Zurn "has maintained a national policy utilized and applied throughout the United States to avoid hiring union members or organizers on a nationwide basis, in all job classifications encompassing employees as defined by the Act, which has resulted in the refusal to consider and refusal to hire employees presently unknown and unnamed by Charging Party." (2:160–162.) At the beginning of the second week of trial, the General Counsel moved to amend the complaint to include the new charge among the others. (6:1181.) The General Counsel suggested that the purpose was clarifying in nature, out of "an abundance of caution," respecting any perceived deficiencies in the allegations. (6:1184.)

Notwithstanding some expression on the first day to the contrary (1:60–62), at trial the General Counsel consistently took the position that the Government's theory of the case, as expressed in the complaint as amended, is that Zurn's national hiring policy is unlawful as applied at the three jobsites in Florida. (2:151; 6:1221; 9:1968; 14:3122, for example.) Thus, the General Counsel does not interpret the complaint as alleging violations at any jobsites elsewhere. This remains the Government's position on brief where it is clear the General Counsel's theory of the case is that the violations are confined to the three jobsites in Florida. As already indicated, although the General Counsel attacks the policy only as applied at the three Florida jobsites, the requested remedial order, from the complaint (p. 8) to the brief (proposed order, Br. at 31–34), has been nationwide in scope.

Although the General Counsel restricts the Government's theory of the complaint respecting violations to apply only to the three Florida jobsites, from "Day One" the Boilermakers has argued that the complaint attacks, as unlawful, Zurn's hiring at all its jobsites on a nationwide basis. (1:44, 64–65; 9:1962; 14:3122; Br. at 5 fn. 1.) Consistent with this broad view of the complaint, the Union served an extensive subpena duces tecum (CPX 8) with the first of 26 calls seeking all personnel files for each individual employed by Zurn, including office and clerical personnel, at any time "at any jobsite with the United States since July 1, 1993." I granted Zurn's petition (CPX 9) to partially revoke. (11:2237.) It is well established that the charging party cannot enlarge upon or change the General Counsel's theory of the case. *Kimtruss Corp*., 305 NLRB 710, 711 (1991). Accordingly, I shall not devote any further attention to the Union's theory or contentions respecting its theory of national violations, and I deny its request (Br. at 5 fn. 1) that I reconsider my rulings.

In our case there are many references to a recent unfair labor practice trial in Cadillac (Grand Rapids), Michigan, before Judge Karl H. Buschmann, whose decision is pending. More than double the length of this trial, the Cadillac case covered 38 days (U. Br. at 9) and generated about 8000 pages of transcript. By motion dated June 9, 1994 (GCX 1ff), the Charging Party requested that Judge Buschmann be assigned to preside at the trial of this case, and the General Counsel joined that motion by position dated June 24 (GCX 1hh). Zurn's opposition is dated June 20. (GCX 1gg.) (In its opposition, at 2, Zurn states that, toward the end of the Cadillac case, the General Counsel moved to consolidate the Michigan case with this Florida case, and that Judge Buschmann denied the motion.) By his order dated June 24, 1994, Associate Chief Administrative Law Judge William N. Cates denied the motion to assign Judge Buschmann to preside at this trial. (GCX 1ii.)

Notwithstanding the prosecution's position that the violations here are limited to the three Florida jobsites, the General Counsel, as well as the Union, repeatedly sought to introduce selected portions of the evidence from the Cadillac case for a variety of reasons. Except for a few limited items, I denied these requests for the obvious reason—by the time Zurn would complete offering its portions in rebuttal and to show context, we simply would be relitigating the Cadillac case. One rather large item which the General Counsel sought to introduce from the Cadillac trial is the reported testimony of Zurn's expert witness, Ephraim Asher, Ph.D., concerning economic and statistical analysis of Zurn's hiring policies as applied at Cadillac. (Asher has a doctorate in economics.) All 170 pages of Asher's testimony (36:7436–7605) from the Cadillac case were offered as GCX 115. Rejecting General Counsel's Exhibit 115, I placed it in the rejected exhibits file. (13:2954.)

As Zurn objected at trial, Asher's Cadillac testimony would be irrelevant here because his study pertained to the Cadillac situation, not the situation in Florida. (12:2534; 13:2954.) Moreover, the proffered exhibit (GCX 115) would be hearsay because there is no showing of agency and Asher was not unavailable. *Kirk v. Raymark Industries*, 61 F.3d 147, 162–166 (3d Cir. 1995).

Before offering Dr. Asher's testimony from the Cadillac trial, the General Counsel, and also the Union, subpoenaed Asher to testify before me. Asher, a resident of Tallahassee, Florida (about 275 miles from Tampa), filed petitions to revoke on the basis that he knew nothing about the Florida jobs, that the Union's tender of expenses was inadequate, that the General Counsel tendered no check for expenses, and that neither party tendered his fee to testify as an expert. At my request (GCX 104) for position statements, the General Counsel (GCX 107) and the Union (GCX 106) filed oppositions, and Zurn filed a position (GCX 105) supporting Asher's petitions. By order dated March 23, 1995 (GCX 108), I granted Asher's petitions to revoke.

Section 11(4) of the Act provides that witnesses summoned before the Board shall be paid the same fees and mileage that are paid witnesses in the Federal courts. (29 CFR § 102.32 also so provides.) Currently, witnesses are to be paid $40 a day for

[5] References to the 18-volume transcript of testimony are by volume and page.

attendance and necessary travel. 28 U.S.C. § 1821(b). A witness traveling by common carrier shall be paid at the most economic rate reasonably available. 28 U.S.C. § 1821(c)(1). 29 CFR § 102.32 states that witness fees and mileage shall be paid by the party at whose interest the witness appears. Taxicab fares and any other normal expenses incurred must be reimbursed. 28 U.S.C. §§ 1821(c)(3) and (4). Rule 45, FRCP, requires that tender of such fees shall accompany service of the subpoena. *O.K. Machine & Tool Corp.,* 279 NLRB 474, 479 (1986). However, fees and mileage need not be tendered to a witness on service of a subpoena issued on behalf of the Government ("an officer or agency of the United States"). 28 U.S.C. § 1825(c).

Rule 45(c)(3)(B), FRCP, provides that any subpoena, (ii) requiring disclosure of an unretained expert's opinion, (iii) may be quashed. Moreover, a subpoena may be quashed if it subjects a person to undue burden. Rule 45(c)(3)(A)(iv). Concluding that the prosecution and the Union were seeking to force Asher to testify as an expert witness and to render an economic and statistical analysis concerning Zurn's hiring policies as applied at the Florida jobsites (Zurn argued that Asher's Cadillac testimony clearly showed that his analysis was limited to his study of that job), I ruled that the Union's subpoena was invalid because the appropriate expert witness fee was not tendered. Also granting the petition to revoke the prosecution's subpoena, I ruled:

> Respecting the Government's subpoena, I find that its subpoena likewise is invalid because no expert witness fee was tendered at the time of service. The reference to "fees" in 28 USC 1825(c) means, I find, the ordinary attendance fee of $40, not the extraordinary fee for an expert witness provided for under Rule 45(c)(3)(B)(ii). I also find, in the circumstances of this case, that requiring citizen Asher to advance his own travel expenses for a 550 mile roundtrip would constitute an "undue burden" under Rule 45(c)(3)(A)(iv), and that this provision, in the context of a 550 mile roundtrip, is consistent with 28 USC 1825(c).

The pleadings establish that the Board has both statutory and discretionary jurisdiction over Zurn. When the trial opened, Zurn stipulated that the unions named in complaint paragraph 3, including the Boilermakers, are labor organizations within the meaning of Section 2(5) of the Act. (1:9.)

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the prosecutor (who attached a proposed order to the General Counsel's brief), the Union, and Zurn,[6] and the reply briefs filed by the General Counsel and by Zurn,[7] I make these

[6] In their briefs Zurn and the Union dropped the "Tr." and substituted the volume number of the transcript. The volume number, plus the page number and name of the witness, made their briefs very helpful.

[7] Reply briefs were discussed at the hearing, and I agreed to accept them. (14:3052, 3056; 18:4219–4221.) Acceptance of reply briefs is within a judge's discretion. *Fruehauf Corp.,* 274 NLRB 403, JD fn. 2 (1985).

FINDINGS OF FACT

A. Litigation History

There have been many unfair labor practice charges filed against Zurn at various locations. I rejected practically all references to these other matters, including copies of letters dismissing some of the charges. I received in evidence any decision by the Board or by an administrative law judge. The first litigated case advancing to an administrative law judge's decision, so far as the record shows, is a decision by Judge Robert T. Snyder on January 17, 1991, involving a jobsite in Tonawanda, New York. (GCX 2; JD(NY)–118–90.) Judge Snyder found that Zurn had violated Section 8(a)(1) by threatening employees with discharge and with verbal harassment because they were wearing insignia supporting the Boilermakers, and Section 8(a)(3) by discharging Robin Coon on August 29, 1989. In the absence of exceptions, on March 5, 1991, the Board adopted Judge Snyder's decision by the standard order. (GCX 2a.) *Zurn Nepco*, 3–CA–15157 (Mar. 5, 1991). (*Zurn Nepco 1*.) I also take official notice of *Zurn Nepco,* 316 NLRB 811 (1995), a case involving a jobsite of Zurn at Pedricktown, New Jersey. In that case, *Zurn Nepco 2*, the Board, modifying and then affirming Judge H. E. Lott's decision (RX 1), dismissed all allegations but a finding that in 1991 Zurn had assisted the United Steelworkers in violation of Section 8(a)(2). [The violation resulted from technical ignorance involving dues-checkoff authorizations rather than from any intention to aid the Steelworkers. Indeed, Judge Lott found that "it was not a deliberate attempt to assist the Union." 316 NLRB at 819.] The Cadillac case, in which Judge Buschmann's decision is pending, apparently is the third case to have been litigated, with this one the fourth.

B. Background

1. Zurn Nepco

As the pleadings establish, and as Human Resources Manager Michael Mace testified (14:3088), Zurn is a construction company headquartered in Redmond, Washington. That is where Mace has his office. Zurn builds industrial power plants. Specifically, the power plants are cogeneration plants with boilers or turbines fired by fossil fuels so as to produce steam which turns a generator that produces electricity. (14:3092–3093.) To be competitive in the cogeneration construction industry, Zurn operates on a "design-build" basis. That is, the plant is designed and engineered during the actual construction. Ordinarily, Zurn builds a cogeneration power plant in about 18 months. This fast-track construction system means that production schedules are critical, but the technique enables Zurn to be a profitable company. (14:3093–3095, 3245.) Zurn is a merit shop contractor, and, preferring to operate nonunion, it performs all of its direct-hire work on a nonunion basis. (6:1427.)

Don Butynski is president of Zurn. (14:3098.) The person in charge of a construction jobsite for Zurn is the resident manager, with the second in command being the general superintendent. (6:1322; 17:4001.) At the construction projects (jobsites) there are personnel supervisors who report both to the resident manager and to Michael Mace, the corporate human resources manager. (6:1321–1322.) Four personnel supervisors are associated in the evidence with the three Florida projects at issue. At **Auburndale** it was *Larry Sullivan* from the project startup in January 1993 through July 5, 1993; *Tom Brigham* from July 6 until Friday, August 20, 1993; and *B. J. Malone*

from Monday, August 23, 1993, to the project's June 1994 completion. At **Bartow** it was *Tom Brigham* from the job's January 1994 startup until about April 11, 1994; *Walter Neal* from approximately April 11, 1994, through our trial's closing date of May 10, 1995 (project incomplete), except for the period of late August 1994 through October 1994 when Walter Neal was on medical leave and Malone and timekeeper Ann Bruner substituted for Neal. At **Mulberry** it was *B. J. Malone* from the October 7, 1994 job startup through the last day of trial on May 10, 1995 (when the Mulberry project was still under construction). Auburndale was completed in June 1994. (7:1621.)

In addition to the three projects at issue here, Zurn recently has built cogeneration plants at three other Florida locations: Okahumpka, Dade City, and Umatilla. (14:3115–3116.) The particular relevance of this fact is its relationship to Zurn's argument (Br. at 19) that these three earlier jobs (Okahumpka, Dade City, and Umatilla) provided a large pool of applicants who are former Zurn employees. The significance of this derives from the provisions of Zurn's priority hiring policy, a topic which is at the heart of the case. Before turning to the details of the case, however, I need to mention the Union's organizing efforts.

2. Boilermakers "Fight Back"

For several years the Union (Boilermakers) has been attempting to establish organizing beachheads at some of Zurn's jobsites. The effort at Tonawanda, New York, appears to have been the first. That was followed by attempts at other locations, including Sterling, Connecticut; Livermore Falls, Maine; Batavia, New York; Erie, Pennsylvania; Plattsburg, New York; Pedricktown, New Jersey; Cadillac, Michigan, and, of course, the jobsites involved here. (3:686–688.)

In evidence (2:439) is a copy of the amended petition (CPX 1) filed April 24, 1992, in **Zurn Nepco**, Case 4–CA–17616, in which the joint petitioners seek an election in a unit of all Zurn's "construction employees employed at all present and future jobsites within the United States and its territories." The current status of that case is described by Regional Director Peter W. Hirsch (NLRB Region 4, Philadelphia, Pennsylvania) in his May 4, 1995 letter (CPX 14; 16:3608) to the Union's attorney, Michael Stapp, as follows:

> Pursuant to your request, I am providing you with a report on the status of the subject representation case. The petition was filed by the United Building & Construction Trades Council of Camden County & Vicinity on April 19, 1991, seeking an election in a unit of all Zurn Nepco's construction employees employed at a job site in Pedricktown, New Jersey. On April 24, 1992, the petition was amended to add the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers as a joint Petitioner and to expand the unit sought to include all construction employees employed by the Employer at all present and future jobsites within the United States and its territories. Throughout the period following the filing of the petition, and its amendment, processing of the petition has been blocked by unfair labor practice charges filed in this and other Regional Offices.

The Boilermakers has named its organizing program "Fight Back." (2:434; 3:706.) Two representatives of the Union who were at the forefront of the organizing effort here are Camilo Juncal, an international representative and organizer (2:164), and James A. "Jay" Bragan, also an international representative and organizer (3:624). Juncal lives in Tampa (2:164), and Bragan (3:623–624, 659) lives in West Virginia. Juncal (2:434–435; 3:504, 528, 616) and Bragan (3:706–708) testified that the purpose of the Fight Back program is twofold. First, it is to "fight back," to regain some of the work (for out of work members) that has been lost in recent years, and second, to organize the unorganized, during nonworktime. Members are encouraged to write the descriptive term "Voluntary Union Organizer" on their applications. Similar to the purpose of notifying an industrial plant manager of the names of employees on an in-house organizing committee, this suggestion is made on the twofold theory that it not only will help protect them from unlawful rejection, but also on the view that disclosing the term actually will enhance their chances of being hired. (2:440; 3:516, 712, 717–718.)

Quarterly the Union publishes a newspaper, **"Fight Back!"** (GCX 53), subtitled "The Boilermaker Organizer," which carries news of the Union's organizing activities, particularly legal news, such as articles about NLRB cases in which, based on charges filed by the Union, settlements or decisions resulted in employees' receiving, in some instances, thousands of dollars as backpay. Two earlier cases referring to the "Fight Back" program are *Sunland Construction Co.,* 309 NLRB 1224, 1234 (1992), and *J. E. Merit Constructors,* 302 NLRB 301, 302 (1991).

C. Zurn's Priority Hiring Policy

1. Policy 303

Zurn has a written policies and procedures manual for its field operations. (14:3095.) Part of those written policies is what is known as policy 303, and it covers employment recruiting. A copy of "Policy No. 303–Revision 2," dated February 28, 1992, is in evidence. (GCX 66.) Michael Mace is Zurn's human resources manager. (14:3087.) When Mace joined Zurn in 1986, Zurn used a priority hiring system which, as revised, Zurn still uses. (14:3115.) The original written version of the policy apparently was drafted in 1991. (6:1339–1340.) With input from Thomas Brigham, personnel specialist; Walter Neal, personnel manager; and others (6:1343; 14:3102–3103), Mace drafted policy 303, revision 2 (GCX 66; 14:3098). It became effective February 29, 1992. (14:3208.)

Any deviation from policy 303 requires the approval of President Butynski. (6:1353.) Although the eight categories of Zurn's priority hiring system from policy 303, revision 2 (usually GCX 66 from this point), are copied in the complaint as paragraph 13(a), and admitted in Zurn's answer, some of the preliminary provisions also are relevant. These paragraphs, as well as the eight categories, read (GCX 66 at 1–2):

> All hiring procedures shall be conducted in accordance with all applicable Federal, State and local laws and regulations. It is the Company's policy to select the most qualified applicant for the job opening without regard to race, sex, national origin, color, citizenship, religion, age, handicap, marital status, or membership in or lack of membership in a labor organization. In selecting the most qualified applicant, consideration shall be given to the following factors:
>
> 1. Work Experience
> 2. Demonstrated Ability
> 3. Demonstrated Reliability
> 4. Honesty and Integrity
> 5. Multi-craft Experience

> Applicant screening will be conducted, and both personal and work references must be generally favorable. Work references should be obtained from supervisors or managers with direct knowledge of the applicant's work history. The Company recognizes that due to the nature of the construction industry, obtaining work references may be difficult, and this is reflected by giving priority to certain applicants where work history and references are more readily obtainable. The Company is committed to providing job opportunities to its own work force, and the promotion of current employees and the rehire of former employees on the basis of their performance and ability to fill new or vacant positions within the Company is encouraged.
>
> Consideration of qualified applicants will be **prioritized** [emphasis added] as follows:
>
> 1. Current Company employees who are eligible for continued employment with the Company, and have obtained an *approved* release by the Resident Manager.
> 2. Former Company employees eligible for rehire.
> 3. Individuals who have appropriate prior work experience recommended by a current Company supervisor or manager.
> 4. Individuals who have appropriate work experience recommended by current employees.
> 5. Individuals who have applicable work experience in the construction of cogeneration or power plants.
> 6. Individuals who have applicable work experience on industrial construction projects.
> 7. Individuals qualifying for JTPA or TJTC.
> 8. All other qualified applicants.
>
> Within each of the above categories, consideration of qualified individuals within the immediate local area will be given first.

The pleadings and evidence reflect that, during the relevant time, this policy was in effect as a national policy, applicable to all Zurn's construction projects. As Zurn acknowledges in its principal brief (Br. at 8), this policy was in effect, during the relevant time, at the three Florida jobsites in issue—Auburndale, Bartow, and Mulberry. Also issued about this same time was a February 24, 1992 memo (GCX 124) by W.I. Neal [Walter Neal] on the subject of "Hiring Procedures and Guidelines, Rev.1." In these nearly 3 pages of guidelines, with the first 2 pages of policy 303, revision 2 attached, Neal lists (in 14 numbered items) specific and practical guidelines for observing policy 303. In the second paragraph Neal states, "There are frequent questions raised on hiring and this is the reason for the memorandum." Mace testified that, other than item 7 pertaining to extraneous writings on applications, the guidelines were in effect at the Florida jobsites. (14:3201–3207.)

On March 8, 1994, revision 3 (GCX 67) to policy 303 became effective. (14:3099.) Although the eight priority categories remain the same (the seventh adds a training program, SMOCTA), some of the other language is modified. In the first paragraph quoted above, handicap is changed to disability, and the fifth item is modified to read, "5. Multi-craft Experience as required." In the next paragraph "certain" is removed as a modifier for applicants in the third sentence. Substantial changes are made beginning with the fourth sentence, so that the remainder of the paragraph reads (GCX 67 at 3) (emphasis added):

> The Company is committed to providing job opportunities to its own workforce, and **when possible, to obtain other employees from a labor pool with qualifications known to the Company.** This includes the promotion of current Employees and the rehire of former Employees on the basis of their performance and their ability to fulfill new or vacant positions within the Company; **it also includes the hiring of persons known to Managers, Supervisors and other Company Employees to be qualified, diligent, and safe workers.**
>
> Consideration of qualified applicants will be prioritized **and preference in hiring will be handled, to the extent possible,** as follows:

Finally, the paragraph following the eight categories is deleted in General Counsel's Exhibit 67. That one-sentence paragraph provided that, within each of the eight categories, consideration will be given first to qualified individuals within the immediate local area.

Human Resources Manager Mace testified that Zurn maintains the priority hiring categories because Zurn needs them. Thus (14:3106):

> The first two priority categories are critical to our effort to staff our jobs. The people who worked for us previously and currently have the job skills, they have the knowledge of the plants and how they're put together schedule-wise; they've worked together with one another. Again, they're aware of the safety practices; they're aware of the personnel practices; they're aware of how the various construction teams work. They're aware of everything from mechanical schedules to electrical schedules and how that all has to fit together.
>
> These people are absolutely essential to our ability to make money to survive from a business standpoint. We have to have them.

Because there can be a time interval of several weeks between the completion of construction at one jobsite and the beginning of construction at another project, Zurn does not transfer hourly craft employees from project to project. Rather, it lays off the workers. The workers then apply at the next project to be rehired. As part of each application process, the worker must pass a new medical examination, including a drug screen. (14:3110, 3214–3216.) Even so, Mace testified that, as Zurn's pool of prior employees is Zurn's most valuable asset, Zurn provides a defined benefit retirement plan for those who work the required number of hours to qualify and vest in the plan, plus a 401(k) savings plan in which Zurn matches, up to a certain percentage, the contribution made by the employee. (14:3107–3111, 3211–3213.)

Mace also testified, essentially, that the same reasoning for according priority categories for current and prior employees (categories one and two) applies for referrals by current supervisors and current employees (categories three and four). Thus, many times Zurn must rely on the recommendations from some of its experienced staff of supervisors and craft employees. "I think it also makes sense, as you look at that, that if one of these folks makes a recommendation, we tend to put some value on it, because that person they recommend may very well be working with them on that crew. (14:3112.) As Mace explains, performing background checks in the construction industry is extremely difficult because of the transient nature of the work. Thus, individual references may themselves be in the

construction industry and will have moved, or telephone numbers furnished are no longer valid. Even when an employer reference is reached, much of the time the former employer will furnish little more than dates of employment. (14:3097.)

Mace testified that, in Zurn's experience, employee referrals have been an important factor in Zurn's ability to staff its construction projects. One aspect of this is that Zurn is able to ascertain some background on the applicant through the supervisor or employee making the referral. "You know, we have someone who can actually talk about that person and has known their dependability, their work skills, their safety behavior and even their character." (14:3113.) Personnel Specialist Brigham confirms much of this, explaining that the frequent inability to contact an applicant's supervisor makes it difficult to obtain important information. (15:3283, 3459.)

By memo dated February 24, 1992 (GCX 124), Personnel Manager Walter Neal issued revision 1 to "Hiring Procedures Guidelines" under policy 303. The memo, with 14 numbered points, contains several guidelines on practices used by Zurn for the three Florida jobsites. Aside from item 7, which was dropped before Florida, the guidelines were in effect for the three Florida jobs. (14:3201–3202, Mace.) The memo (which is a copy of RX 56 from the Cadillac case, 14:3000–3001), reads:

> The purpose of this memorandum is to provide guidelines to the projects on hiring procedures for non-supervisory craft workers. It is Company policy to strictly follow all Federal, state, and local laws. The applicant's race, color, sex, national origin, citizenship, age, religion, disability, marital status, or union affiliation shall not have any bearing on employment decisions. It is Company policy to hire the best qualified individuals within the parameters discussed in Policy 303—Recruiting of Field Hourly Employees (copy attached.)
>
> There are frequent questions raised on hiring and this is the reason for the memorandum.
>
> 1. The company does not transfer non-supervisory construction workers from job-to-job. Each job exercises its own independent discretion on who to hire.
>
> 2. Former Zurn/NEPCO workers who left their previous Company employment under negative circumstances are not automatically barred from reemployment. While their employment is generally disfavored, the project should consider the circumstances and the recency of the problem. If at all possible, reference checks should be made from other Company employees who may have familiarity with the person. Final approval *must* be obtained from Personnel (get it in writing).
>
> 3. Applications for craft positions are active for only 30 days. Inactive applications should never be considered for hire. Individuals wishing continued consideration must refile a new application. The best think to do is to keep a separate "inactive applications" file. All applications should be preserved for at least one year from the date of application. At that time they should be destroyed, after receiving written permission from the Manager of Personnel, Field Operations.
>
> 4. If for some reason there is a need to go back to the inactive application file to find qualified workers, this should be limited to a specific craft and specific time period (such as applications that are dated within the past 90 days). The project must document with a memo this exception to the policy.
>
> 5. The application must be complete and can only be submitted for one position. Incomplete applications should be considered only in the event the project has no other qualified applications. In that event, the applicant should be contacted to complete the application.
>
> An application for more than one position should be placed in the job application file that appears most suited to the experience of the applicant. Usually this will be the first position listed by the applicant. An applicant is permitted so [to] submit applications for different positions.
>
> 6. The Company does not have sufficient staff to specifically respond to general inquiries from applicants concerning their status. It is permissible to reply that if the applicant has an active application, it will be give consideration if and when there are job openings. If time permits, you can check and confirm that the applicant has an active application. Because of the constant changing schedules, avoid making predictions as to future openings. Also, it is against policy to discuss the status of other applicants with non-employees.
>
> 7. We prefer not to have writings on applications indicating that the applicant is a member of a protected group (such as race, age, etc.). Do not void such applications or instruct the applicant to not make such indications. Some jobs have received applications with "voluntary union organizer" written on the top of the first page. If a job receives one or more such applications, use a permanent sticker to cover the writing, if possible. At that time, the same stickers should be placed in a similar location on all active applications for that craft and all future applications, even if there is no writing on the top. This should be done by one person and no written or mental list or other copies of such applications should be maintained. The reason for this is that the Company does not want to knew this information. It shall have nothing to do with applicants being fairly considered.
>
> 8. Occasionally projects will get telephone calls or visits from representatives of labor organizations. These should be handled exclusively by the Resident Manager. The Company does not sign local labor pre-hire agreements. All offers to supply manpower should be directed to apply for the pertinent positions like everyone else. You are under no legal requirement to inform any person as to anticipated hiring needs. All contacts must be documented and reported to the Manager of Construction and to the Manager of Personnel, Field Operations.
>
> 9. All contacts from governmental agencies should be handled by the Resident Manager. However, the contacts with Job Service can be delegated to other employees. Any contacts concerning investigation of employment practices from such agencies as to the NLRB, Department of Labor or OSHA should be immediately reported and referred to the Manager of Construction and Manager of Personnel, Field Operations and if it involves safety issues, to the Manager of Safety.
>
> 10. If a large group of applicants show up at the job site, the local policy should be contacted in order to ensure safety and order. The applicants should be directed to the local Job Service office.
>
> 11. Applications are only accepted through Job Service. Do not maintain "open listings" for positions where you are not hiring or do not anticipate hiring for the next

30 days. The Project can use its discretion on relisting positions, depending on such factors as the number and quality of current applications on file for the positions, the number of openings anticipated, etc.

Do not accept any applications for positions not listed as open with Job Service.

12. We do not automatically hire individuals "requested" by a supervisor. That individual must complete an application through Job Service like everyone else. The application must be considered along with all other active applications on file in accordance with Company policy.

13. Projects sometimes receive unsolicited resumes and applications directly from applicants for craft positions. The project can either: (a) return the resumes or applications with a note directing the applicants to Job Service, or (b) put the resumes or applications in the inactive file with a dated notation indicating it was received directly from the applicant. Be consistent with one of these for the life of the job. For non-craft positions, the material should be forwarded to the Manager of Personnel, Field Operations.

14. Efforts to contact applicants for interviewing, etc. should be documented. The preferred approach is to keep a diary which indicates dates of contacts and responses, if any. This also could be noted on the application itself.

Remember, these are guidelines. Common sense must prevail. The key is to have a consistent policy. Any modifications of the foregoing must be approved by the President of the Company.

2. First look at the major contentions

The General Counsel argues that Zurn's word-of-mouth hiring practice unlawfully promotes "its discriminatory preference for nonunion applicants." The practical effect of Zurn's priority hiring categories (particularly the first four) is to screen out union organizers and union sympathizers. The General Counsel urges a finding that Zurn's (national) hiring policy is unlawful as applied at the three Florida jobsites. Further, the General Counsel contends that Zurn draws its employees from a tainted pool of applicants. The General Counsel relies on *D.S.E. Concrete Forms,* 303 NLRB 890 (1991), and *Ultrasystems Western Constructors,* 310 NLRB 545 (1993), remanded as to remedy 18 F.3d 251 (4th Cir. 1994).

The Union argues that Zurn's priority system itself is discriminatory and produces an applicant pool composed of individuals with a nonunion background. The system, the Union argues (Br. at 61), makes it "virtually impossible for a union applicant" to be hired. One aspect of the system attacked by the Union (as well as by the General Counsel) is the recruitment and hiring from "followings." As discussed in more detail later, a "following" is simply those workers a supervisor knows from previous jobs as being good, dependable workers and who, at his request, "follow" him from job to job. See, for example, *Ultrasystems*, 310 NLRB at 550.

Defending its priority hiring system as founded on legitimate and compelling business reasons, and as a time-honored practice recognized in Board decisions providing for voter eligibility in the construction industry, Zurn relies on a series of cases, including *Sunland Construction Co.,* 309 NLRB 1224 (1992); *J. E. Merit Constructors,* 302 NLRB 309 (1991); and (respecting the rationale underlying voter eligibility) *Daniel Construction Co.,* 133 NLRB 264 (1961). In its reply brief, Zurn argues that the cases relied on by the General Counsel and the Union are inapposite.

At trial the General Counsel suggested that Zurn's priority system "as applied" is "inherently discriminatory" (2:151–152; 11:2243–2244) or "inherently destructive" (14:3183). Earlier the General Counsel acknowledged that the Government's "inherently discriminatory" argument is not the same as the "inherently destructive" standard. (2:151.) The General Counsel also stated (11:2243–2244) that the Government was not necessarily advancing an argument of facial unlawfulness under *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967). Zurn devoted space in its brief arguing that a *Great Dane* theory is "wholly inapposite." On brief, neither the General Counsel nor the Union cites *Great Dane* nor makes an "inherently destructive" argument. Instead, the Union, citing Title VII of the 1964 Civil Rights Act, as well as *D.S.E. Concrete Forms,* 303 NLRB 890 (1991), and *Ultrasystems*, 310 NLRB 545 (1993), argues that Zurn's "priority system itself is discriminatory." And the General Counsel, relying on *D.S.E.* and *Ultrasystems*, argues that Zurn's hiring policy has the "effect" of screening out "union organizers and other union sympathizers."

D. Florida Job Service—Zurn's Special Agent

Complaint paragraph 4 alleges that, at all material times, the Florida Job Service (FJS), a state agency, "has acted as an agent of Respondent for the purpose of obtaining employees." Zurn denies that allegation, and also denies complaint paragraph 5 which alleges that the following employees of FJS are agents of Zurn within the meaning of Section 2(13) of the Act: Joe Murray, veterans representative; Mattie Lewis, receptionist; and Gerald Jaisarie, assistant to veterans representative. At trial the General Counsel argued that practically anyone who worked at FJS was Zurn's agent. I granted Zurn's motion for a standing objection to statements by those named as agents (2:323, 343), and I denied (4:766, 771) the General Counsel's motion that the Government be permitted to examine the alleged FJS agents under Rule 611(c), FRE. Merely alleging agency does not entitle a party to examine under Rule 611(c), particularly where the witness is an employee of an "outsider," in this instance a governmental agency.

In addition to alleging, in complaint paragraph 9, that Zurn, by FJS representative Joe Murray, "threatened that Respondent would not hire employees if they engaged in union activities" (an allegation I discuss in a moment), the General Counsel would impute any knowledge of or conduct by FJS to Zurn. The General Counsel argues that Zurn gave FJS the cloak of apparent authority respecting all matters concerning the collection and distribution of applications. The Union's position is consistent with the General Counsel's.

Disputing the agency argument, Zurn argues that FJS was not its general agent, but only its special agent. Because there is no evidence showing that Zurn authorized or directed any unlawful conduct by FJS or its staff, Zurn is not liable for any unlawful act by FJS. In its reply brief, Zurn dismisses the General Counsel's apparent-authority argument as irrelevant because Zurn acknowledges that FJS was its special agent. As Zurn frames it (Reply Br. at 30), the issue is "whether Job Service's tightly defined special agency role would make Zurn liable for Job Service misconduct of the type alleged." Moreover, "As Zurn's special agent, FJS could act in Zurn's stead only to the extent the latter had conferred on it authority to do

so. *Westward Ho! Hotel,* 251 NLRB 1199, 1208 (1980)." Indeed, Zurn continues, quoting from *Westward Ho,* supra at 1208, the core question is "whether Respondent *expressly* [emphasis added] requested or authorized the activity in question."

Aside from the matter of special agency, there are three problems with Zurn's *Westward Ho* argument. First, Zurn inadvertently fails to report that the Board partially overruled *Westward Ho* in *Allegany Aggregates*, 311 NLRB 1165 fn. 3 (1993) (a case cited in Zurn's briefs). The stated basis of the overruling is to the extent *Westward Ho* can be read to suggest that the Board applies a different legal standard (respecting agency questions) in the case of "outsiders." What impact that overruling has, if any, on Zurn's *Westward Ho* argument is not clear. The second problem is Zurn's linking of special agency to *express* authority, as if *apparent* authority were not applicable. Indeed, in *Westward Ho* itself the administrative law judge, after finding no express authority, went on to consider whether there was apparent authority. Finding none, he dismissed the complaint. In adopting the dismissal, the Board, at footnote 2, stated that it need not reach the administrative law judge's finding of no agency because the Board viewed the third party (an employment service) as, at most, a special agent rather than a general agent.

The third problem is that Zurn's argument does not address the doctrine of implied apparent authority. (In fact, none of the parties mentions the doctrine.) Authority may be actual or apparent, with the latter resulting from a manifestation by a principal to a third party that another is his agent. As the Board wrote in *Communications Workers Local 9431 (Pacific Bell),* 304 NLRB 446 fn. 4 (1991):

> Under this concept, an individual will be held responsible for actions of his agent when he knows or "should know" that his conduct in relation to the agent is likely to cause their parties to believe that the agent has authority to act for him. Restatement 2d, *Agency*, Section. 27. As with actual authority, apparent authority can be created either expressly or, as in this case, by implication.

In the next paragraph the Board goes on to find "implied apparent authority."

Based on the facts which I describe later, I agree with Zurn that Zurn, in effect, designated FJS as its special agent, not its general agent. Zurn designated FJS in this respect by express actual authority to handle certain matters of registering, screening, and referring applicants. I also find that FJS did not have actual authority, either express or implied, to commit any of the unlawful conduct which the General Counsel would impute through FJS to Zurn. The next question is whether the circumstances show there was apparent authority, either express or implied, for FJS either to (1) make coercive statements to job applicants or (2) acquire and pass on to Zurn information concerning union insignia or other expressions of union support by job applicants. The General Counsel argues that, under the doctrine of apparent authority, all conduct by FJS in the application process should be imputed to Zurn. Such a scattergun argument disregards the two classes of agency and ignores the different methods (express and implied) of establishing whether authority was actual or apparent. Thus, the General Counsel blurs the classifications and distinctions which the Board so clearly outlined in *Pacific Bell*. In effect the General Counsel merges the concept of special agency into that of general agency, and transforms FJS from a special agent into a general agent on the basis of apparent authority, a concept which applies to both general and special agents.

Actually, because of the findings I make, it is unlikely that any difference in result would obtain even if FJS were considered Zurn's general agent rather than its special agent.

Before turning to the alleged acts of coercion, some description should be given about the nature of the Job Service. That is the name of a Federal program to assist state employment services. The program apparently was created in 1933 under the Wagner-Peyser Act, as amended in 1982. Yvonne Jordan, a supervisor for the Lakeland, Florida office of FJS, testified that FJS receives funds from both the state and Federal Governments. (18:4146, 4155.) A source of the Federal funding comes from FUTA taxes, the Federal unemployment taxes paid by employers. (18:4149–4150.) Funding is not impacted by whether applicants are hired or by the number of applicants using the services of FJS, Jordan testified. (18:4147–4149.) Florida (and Federal) rules (RX 112) prohibit discrimination against an applicant because of that person's union or nonunion status or sympathies. Under the rules, an employer found guilty of discriminating can be precluded from receiving any assistance from FJS. Moreover, Jordan testified that any FJS employee found discriminating against an applicant because of that person's union or nonunion status may be disciplined. (18:4169–4170.) I turn now to allegations of coercion, one of which involves employees of FJS.

E. Alleged Threats

1. Introduction

The complaint alleges that, on three occasions, agents of Zurn threatened adverse economic action against job applicants or employees who engaged in union activities. Zurn denies. The threats are alleged as violations of Section 8(a)(1) of the Act. I dismiss the three allegations.

Complaint paragraph 8 alleges that, at the Auburndale jobsite about June 1993, Safety Technician Ron Gay "threatened to discharge employees if they supported the Boilermakers Union." Paragraph 9 alleges that, about August 23, 1993 at the Lakeland office of the Florida Job Service, Veterans Representative Joe Murray (a Job Service employee) "threatened that Respondent would not hire employees if they engaged in union activities." As amended at trial (6:1181), complaint paragraph 10 alleges that, at the Mulberry jobsite about October 10, 1994, Personnel Manager B.J. Malone "impliedly threatened not to hire employees because of their union affiliation."

2. Ronald Gay

Aside from the merits of the threat allegation, Gay's status as a statutory (Sec. 2(13) of the Act) agent of Zurn is disputed. Because I find no merit to the threat allegation, I do not address the agency issue.

Christopher Bass testified in support of the threat allegation. Bass worked for Zurn at Auburndale for a bit over 3 months, from April 13, 1993, to July 22, as a laborer and then as a boilermaker helper 3. He testified that one day in June he observed some men distributing papers outside the fence. Bass never read one of the papers, but someone told him that the papers were union literature. The next day, Bass testified, Zurn issued one of a series of memos to employees. The memo, signed by Resident Manager Marty Plackard and General Superintendent J.D. "Hoot" Gibson, prohibited employees from selling anything, including food items, and (11:2370, 2395) threatened to

fire any employee who accepted union literature, distributed union literature, or had any "dealings with the union." Despite the supposedly general distribution of the memo, no copy of the purported memo, or of the union literature which supposedly triggered the memo, is in evidence, nor does the General Counsel base any allegation on this incident. Instead, the incident is preliminary to the subsequent conversation which is alleged.

Denying that any such memo ever issued, General Superintendent Gibson identified a June 10, 1993 memo (RX 10) from him to all employees. In his June 10 memo Gibson advised that no Zurn employee was to be in or around the trailer of the client or of the subcontractors at any time. "Violation of this directive will result in disciplinary action up to and including termination." Safety Technician Gay also denies that any memos issued by management respecting union activity. Bass denies that the June 10 memo is the one which he describes.

According to Bass, soon after the purported memo issued he complained to his friend Ron Gay about the restrictive nature of the memo and asked why Zurn was being so restrictive. Gay, according to Bass, said it was because the union had been causing problems for Zurn on other jobsites. Gay said that, to avoid problems, Zurn would not hire any union members, and that anyone seen talking with a union representative would be fired. (11:2371–2376, 2395, 2403–2406, 2413.)

Asserting that he has a fairly good memory, Ronald Gay testified that, as Bass was curious about company policy, Gay explained company policy about safety. Gay denies (17:4016–4017, 4020–4021) making the statements about unions and Zurn attributed to him by Bass.

Bass appeared to be an unreliable witness. His recitation was not as crisp as either Gibson's or Gay's, and his memory apparently is not as strong as that of either Gibson or Gay. Finding Bass to be an unreliable witness, and crediting the more reliable Gay and Gibson, I find that the phantom memo from Plackard and Gibson never existed. I also find that, while Gay spoke to Bass about company policy respecting safety, Gay never discussed with Bass any Zurn policy about unions and that Gay never told Bass that Zurn would not hire any union members and would fire anyone seen talking with a union representative. Accordingly, I shall dismiss complaint paragraph 8.

3. Joseph Murray

Jerry Freeman has been a member of Boilermakers Local 433 (the Tampa local) for over 21 years. About mid-August 1993 the Union (either Camilo Juncal or the dispatcher) called to report that applications for Zurn were being taken at FJS (Lakeland, Florida office). Freeman agreed to report to FJS the morning of August 17. At FJS the morning of August 17, Freeman, at Juncal's instruction, wrote "Volunteer Union Organizer" in the space at the bottom of an FJS 511R form where it asks for any other special skills. Near the top right of the form, in the space for "13. Employer" appeared the name "Zurn" printed by hand in red ink. That part was not added by Freeman. He then (or Juncal on his behalf) placed the form in a box on the receptionist's desk. There is no evidence that Freeman (a disabled veteran) met that day with a veteran's representative, so as to be registered in FJS' computer, or that Freeman filled out a standard Zurn application form.

Pursuant to another call from the Union, Freeman returned to FJS the morning of August 23. On this occasion, Freeman testified, he was interviewed by Joseph Murray, one of the veterans' representatives. Freeman testified that he told Murray he was there for one of the jobs at Zurn. Murray asked about his experience, and Freeman reported his skills. Murray asked how he had obtained his experience, and Freeman replied that he had worked for 19 years out of the Union. According to Freeman, Murray chuckled and said, "Oh, that's why they haven't called you. This company's not into hiring union people." (10:2124, 2141.) At that point, Freeman testified over objection, a man in casual clothes who had been working at a nearby computer desk, walked over and handed Murray a paper and said, "Look, they have a call in right now for a boilermaker." As Freeman recalls, Murray then handed the paper back to the unidentified individual.

Moments later Murray handed Freeman a standard Zurn application which Freeman completed and returned to Murray. (GCX 90.) In addition to placing, on the form, a couple of references to Local 433 (respecting working history and who had referred him), Freeman also entered, in the space calling for other special skills, "Volunteer Union Organizer." According to Freeman, after Murray had inspected the application he told Freeman that he would submit Freeman's application, but he knew that Zurn would not hire a voluntary union organizer. (10:2127, 2141.) Freeman testified that he asked for Murray's name and wrote it down in Murray's presence. Freeman was never called for a referral to Zurn.

Testifying before Freeman, Murray (also a veteran) testified that union membership plays no role in whether he refers an applicant to Zurn (4:975), and he denies (4:983) ever threatening an applicant that Zurn would not hire a union organizer. He also denies (4:985–986) that anyone from Zurn or FJS ever told him that Zurn prefers nonunion applicants over union applicants or that he should not refer union applicants or that he should not refer union applicants to Zurn. Indeed, Murray forcefully testified that if anyone from Zurn had asked him not to refer union applicants, he would have reported the matter to Irv Fallin, the representative in charge of the local veterans program, so that a complaint could be filed. (4:925, 986.) Murray considers the veterans, not the employers, to be his primary clients. (4:971.)

Joseph Murray testified with impressive sincerity, forthrightness, and with more persuasion than Jerry Freeman. I am persuaded that he testified truthfully. Finding that Murray did not make the August 23, 1993 remarks (concerning Zurn's not hiring union members or organizers) attributed to him by Jerry Freeman, I shall dismiss complaint paragraph 9.

4. B. J. Malone

In the Government's brief, the General Counsel describes several events and conversations at the Mulberry jobsite over the course of October 10–12, 1994, without ever specifying which remark on which date constitutes the alleged threat. Fortunately, covering the same events, the Union (Br. at 34) specifies an October 10 "keeping tabs" remark which Union Representatives Juncal (2:283) and Bragan (3:671) describe. In its principal brief, the Company focuses on an October 11 conversation about a copy of the Union's first issue (GCX 53), Winter 1993, of its **Fight Back** quarterly publication for its organizing program. During this conversation Malone, responding to a statement by Bragan that he has been trying for 3 years to get hired by Zurn, remarks that it is more like 5 years. Although I find that both conversations occurred, I focus on the "keeping tabs" conversation of October 10 because that appears to be the one targeted by complaint paragraph 10. Enlightened by the Union's brief, Zurn addresses the "keeping tabs" remark in Company's reply brief (at 41–44).

Malone denies the October 10 conversation (17:3891), but he is a bit less sure about the "keeping tabs" remark, asserting that he does not think he ever said that and does not recall saying it. (17:3894.) I credit the more positive testimony of Union Representatives Juncal and Bragan. Briefly, on this occasion, as both Juncal and Bragan were informing Malone that they had applied for work at Zurn, Bragan told Malone that he recently had been in New York working for Zurn's number one competitor, CNF. Malone responded that he knew that Bragan had been working there. Surprised, Bragan asked how Malone knew. "Jay," Malone replied, "I keep tabs on you, just like you keep tabs on me. I know where you are all the time, and you know where I'm at all the time."

The implication of Malone's statement, the Union argues, is that Bragan's continuing efforts to organize Zurn would prevent Bragan's being hired by Zurn. I disagree. At most the statement possibly could form the basis for some allegation of implied surveillance (not alleged). Given the fact that Bragan has been seeking for several years to be hired by Zurn; given Bragan's status as a paid staff organizer for the Union; and given Zurn's preference to remain nonunion, a remark by Malone that he and Bragan keep tabs on each other's whereabouts (whether true or not) conveys nothing more than a construction employer's acknowledgment of its right to be aware when and where the next organizing attempt might be made at one of its jobsites. Finding nothing coercive in Malone's statement, I shall dismiss complaint paragraph 10.

F. Zurn's Arrangement with Florida Job Service

Zurn has used the services of Job Service around the country for as long as Human Resources Manager Michael Mace has been with the company (since 1986), and Zurn has used FJS for all Zurn's projects in Florida (14:3130.) Mace testified that Zurn uses FJS to handle the application and initial screening, much of the paperwork (including I-9 immigration forms) and administrative burden, because Zurn does not maintain a full personnel office staff at the jobsites. FJS relieves Zurn of much of this burden because Zurn is simply not staffed at the jobsite to cope with the administrative burden such duties entail. Moreover, with only trailers at the jobsite, Zurn does not have the office space needed. Zurn does pay FJS for these services. (14:3130–3131, 3248–3249.) Personnel Specialist Tom Brigham confirms the skeleton staff aspect and explains that the few-in-number personnel staff is one of the reasons Zurn uses FJS and one of the reasons Zurn does not accept applications by mail. (15:3519.)

Before hiring began at the three jobsites involved here, Mace drafted and sent a letterhead memo, dated January 15, 1993, to Florida's Department of Labor, the text of which memo reads (RX 16):

> 1. Zurn/NEPCO has more than 50 years experience as a world leader in the design and construction of wood-fired power plants. It is a wholly owned subsidiary of Zurn Industries of Erie, Pennsylvania, a company which has existed for more than 75 years. NEPCO's corporate office is located in Redmond, Washington.
>
> 2. Zurn/NEPCO will design and construct a 40 MW combined cycle cogeneration plant in Lakeland, Florida. [There is no dispute, and different witnesses testified, that the Lakeland job is the same as the Auburndale job.] About 150 construction workers will be employed at peak during construction of this 16 month project which is scheduled to be completed the summer of 1994.
>
> 3. Zurn/NEPCO is committed to Equal Employment Opportunity **and forbids any discrimination** on the basis of race, color, sex, national origin, religion, citizenship, age, disability, marital status, or **membership or lack of membership in any labor organizations**. [Emphasis added.]
>
> 4. It is mandatory that each applicant use a Zurn/NEPCO application and that it be completed in full. We suggest Job Service meet with each applicant to explain this. It has been our experience that this does not take place when applications are made in bulk and would therefore request that Job Service not accept such applications. They should be returned to the sender with a note requesting each individual applicant schedule a visit to Job Service.
>
> 5. Zurn/NEPCO wishes to utilize training programs sponsored or offered through the Job Service.
>
> 6. If there are any questions or problems, please contact Larry Sullivan.

Dated January 10, 1994, a similar letter (RX 17) was sent respecting the Bartow jobsite. So far as the record discloses, no such letter was sent respecting the Mulberry project, apparently because Zurn replaced another contractor on that job.

Yvonne Jordan has been a supervisor at Florida Job Service's Lakeland office since about 1992. (18:4038.) The Lakeland office, Jordan testified, also covers [in addition to the Auburndale job] Bartow and Mulberry (18:4156), and for these three jobsites of Zurn, Jordan testified (18:4056, 4062), FJS performs (as of the trial, only the Auburndale job was complete) the services of initial screening, processing applications, and referring applicants who meet Zurn's minimum qualification requirements (18:4042, 4048–4049, 4151). Applicants who successfully pass the initial screening by FJS are referred to Zurn if there is an open job order from Zurn for the type of job applied for. (4:974–975, Murray; 18:4047, Jordan; 18:4193, Franceschi.)

Maria Franceschi has worked at Florida Job Service's Lakeland office for about 4 years. (18:4177.) Although she currently works part-time (18:4143, 4177), until August 1994 she worked full time as a job order taker, although her official title was Employment Interviewer. (18:4177–4178.) Jordan testified that Janet Branch is the marketing representative for the office and that, in that capacity, Branch meets with the Lakeland Economic Development Council where she learns of new work projects and job needs for the area. (18:4051–4052, 4066, 4145.) Even before Zurn arrived, Jordan learned from Branch that Branch had learned from the Council some information on Zurn's job needs. (18:4066.) Eventually Zurn representatives, including Larry Sullivan, came to the Lakeland office and met with Jordan and others. Zurn furnished FJS written job descriptions and pay scales. (14:3254; 18:4063, 4065, 4152.) No party introduced copies of the job descriptions into evidence. (15:3561.) Franceschi testified that Branch gave her copies of the job descriptions. (18:4179.)

From the job descriptions, Jordan testified, personnel at Florida Job Service's Lakeland office prepared "job orders" according to the specifications set forth in the job descriptions. (18:4063.) These job orders are then entered into the FJS computer. (18:4052.) Jordan testified that screening of applicants is done from the job descriptions (as entered onto the job orders in

the computer). (18:4064.) Franceschi is the person who usually entered the information into the computer. (4:988–989; 18:4179.) The term "job order" has two aspects. First, the term refers to the telephone call, fax, or mail order from the personnel person at Zurn notifying FJS of the job openings and the requisition number. From this call, and the job descriptions which Branch had given her, Franceschi would enter the job order on the FJS computer with the information coded. (18:4178–4179.) The computer screen, or its printout, also is referred to in the record as the job order. Copies of computer printouts of some of the job orders are in evidence, with GCX 59, GCX 62, and RX 103 being examples. As these examples reflect, the top section consists of the order information, including order number, craft title (such as pipefitter), job location, person to contact, pay rate, and related information. That section is followed by the job summary (4:882), apparently taken from the job description form, listing the minimum skill qualifications (such as at least 5 years' experience in layout, fabricating) required for the job. A third section would show data on referrals and any verification of whether a referral was hired.

As soon as Franceschi, for example, had entered Zurn's telephoned job order into the computer, that information could be accessed by two groups: one, by the FJS interviewers, and two, by job applicants themselves. FJS (the Lakeland office) has available, in the lobby area, 13 computer terminals where job applicants can search for any job openings. (4:818, 851, 892, 898, 900; 18:4040.) As Mattie Lewis (an employment interviewer then, a customer service specialist now) explains, one important feature of the computers available to the public is that their screen does not give the employer's name. (4:852, 892.)

Applicants at FJS are divided into two main classes: military veterans and nonveterans. By law, veterans are placed in a priority category. Thus, a veteran who visits FJS seeking assistance in finding work is referred to a veterans representative where, in the course of an interview, the veteran is registered at FJS by having his name, social security number, and other data entered into the FJS computer. The veteran is so registered regardless of whether there is a job opening for which he is qualified. Although the record is rather ambiguous on the point, it appears that walk-ins who are nonveterans are not so registered. At least usually they are not, and, when there is no job opening for which they are qualified, may be told to "keep in touch." (4:846, 847, 850, M. Lewis.) Jordan testified that a nonveteran is not fully registered on the computer. Thus, when a job order comes in, a nonveteran is not called and informed. (18:4153.)

By contrast, when FJS accesses its computer, the only names which pop up are those of veterans registered for the specific job. As Jordan testified (18:4153), the only way a nonveteran would learn of a new or existing open job order (orders put on hold are not open) would be if he walked into the FJS office and did his own job search on one of the computer terminals situated in the lobby (or if he had a friend present who did that and called him). Moreover, job orders are not released to the public computer terminals until after FJS personnel have attempted to notify the veterans who are registered.

When there is an open job order, and the applicant, whether veteran or nonveteran, is called to the interviewer's desk, a prescreening occurs to see whether the applicant appears to be qualified. If so, the applicant is given a Zurn application to complete. When the completed Zurn application is tendered to the interviewer, the second half of Florida Job Service's initial screening process occurs. If the interviewer determines that the applicant meets the minimum qualifications set forth on the job order, the interviewer sends the completed Zurn application (one for each open job applied for), with a FJS for 516 referral card attached, to Zurn. He then waits for a call to be interviewed by Zurn at the jobsite. The purpose of the 516 referral card, Yvonne Jordan testified (18:4054, 4159), is so that the employer will mail it back to FJS to show whether the applicant has been hired. The parties stipulated that the reverse side of the 516 has a "No Postage Necessary" return address to FJS. (18:4205–4207.) The record reflects that frequently the card is not returned by employers and FJS personnel have to do much of the verifying by telephone.

So far I have described what mainly is the general procedure followed by FJS for all employers, including Zurn. The service provided by FJS for Zurn includes, and did during the relevant time, several specific requirements and procedures. One of those, as I shall describe, was and is the procedure pertaining to "name calls."

G. Zurn's Hiring Procedures

1. Name calls and followings

As Zurn's personnel supervisors testified, the order to hire (requisition) one or more craft employees originates with the craft superintendent. The requisition is approved, or not, by Zurn's resident manager. When the requisition is approved, the personnel supervisor contacts FJS. (6:1335, Neal; 7:1547, Malone; 8:1883, Brigham.) B.J. Malone testified that if the requisition has names on it (name calls), he tries to contact the name calls and recruit them. (7:1547–1548, 1557.) Walter Neal testified that, when an applicant is referred by FJS, Neal interviews the person. If Neal finds the applicant acceptable, he tries to have the supervisor interview the person, but on occasion he makes the hiring decision on his own. Before the person is hired, a reference check is made, and the applicant is sent for a physical examination and a drug screen. If the applicant passes all these checks, he is hired and begins work. (6:1335–1338.) Tom Brigham reviews the applicant with the general foreman, and the selection is made with the general foreman. Brigham does a reference check and also talks to any referring employee. (15:3445–3447.)

All applicants, even name calls, must register at FJS and be referred by FJS. For a name call (someone who would be in one of the first four priority hiring categories), the process at FJS should be mostly a formality even though he is screened there, completes an application, and is referred as any other applicant for a job opening. A name-call applicant is reasonably well assured of being hired at the successful completion of the required procedural steps. The first big difference shows up at the FJS level, for the job order itself, although it may be an order for 10 pipefitters, may also show, for example, that 7 are name calls, with FJS to supply only the 3 remaining pipefitters. (8:1883, Brigham; 14:3130–3131, Mace.) Thus, a name-call applicant ordinarily is reasonably assured of a referral to the jobsite. Once at the jobsite, his interview is with people who have called for him by name for a job opening in his craft skill. Thus, unless he has developed a medical problem or has begun taking drugs since he last worked for Zurn, or last worked with the person who referred him, his chances of being hired are excellent. If FJS refers military veterans for the other open slots, the veterans may be hired, but they do not have the ad-

vantage of having been referred by a Zurn employee or having been called by name from a supervisor's following.

As mentioned earlier, before its three projects in issue here, Zurn had just completed three other Florida projects—Okahumpka, Dade City, and Umatilla—when it began hiring for Auburndale. (14:3115–3116, Mace.) As a consequence, Zurn had a large pool of prior Zurn employees as applicants for employment at Auburndale. An important document, both in Zurn's business and in this case, is the "brass log." Under Zurn's policy 304, revision 4, Employment Process, section I under Practice, the policy provides that "The Personnel Supervisor will issue a numbered brass and a numbered badge to the new Employee when all forms have been read, completed, and signed." (CPX at 3.) The same document provides, under Responsibilities at A.9, that the personnel supervisor is responsible for "9. Maintaining a chronological register by badge number of Employees." (CPX 5 at 4.) Although Personnel Supervisor B. J. Malone refers to the chronological register as the "personnel log" (7:1472), and the forms themselves are denominated "New Hire/Rehire Data Sheet," Mace (14:3139) and the parties refer to it as the "brass log," and that is the term I generally use.

In its 10 columns across the page, the brass log reflects the badge (or brass) number (first column from left), employee name, social security number, date of hire, classification and pay rate, whether a resident, race/sex, whether a name call (column eight), whether a former employee (column nine), and the DOT (date of termination) and reason. Thus, the brass log for a project reflects, in part, the names and chronological sequence of employees hired and whether they were a name call, a former employee, or both. Personnel Supervisor Walter Neal (his actual title is manager of personnel, 14:3265; 16:3723) defines a "name call" as a person known by a supervisor or employee who has worked with the name call and who is referred by the supervisor or employee. (6:1362, 1429.) Those employees in the first four priority hiring categories (including current employees) of Zurn's policy 303, constitute the source of name calls. (6:1363–1364.)

Earlier I described a "following" to be those craft employees a supervisor knows from previous jobs as being good, dependable workers who, at his request and reference to his Employer, "follow" him from job to job. Although B. J. Malone does not use the term (7:1550), Neal does (6:1372; 16:3787), as does Brigham (8:1823.) As we can see, the terms "name call" and "following" frequently are closely related, for many, probably most, name calls are for craft employees who are members of the followings. In fact, as Neal explains, Zurn prefers to hire employees from the followings because the value of such craft employees is a factor known to Zurn. (6:1427.)

2. The 30-day period and other restrictions on applications

Zurn has several additional restrictions in its hiring procedures. Some of the more prominent ones are these. **(1)** Zurn accepted only those applications which were Zurn's own application forms. It did not accept or consider generic application forms, resumes, faxes, letters, or anything else from employment applicants. **(2)** As already noted, Zurn required all applicants (even name calls) to register at FJS, submit a completed Zurn application to FJS, and be screened and referred by FJS pursuant to an job order. **(3**) Zurn applications are good for a specific jobsite. Thus, an application submitted for an opening at Auburndale would not suffice for a job opening at either Bartow or Mulberry. **(4)** Applications, on Zurn's application forms, must be submitted for one job opening only, such as pipefitter, per application. [A second or third application could be submitted, each for specific job openings, such as for boilermaker or for ironworker.] **(5)** As stated on the face of the Zurn application forms, a Zurn application is active for only 30 days. After that the application becomes inactive and an applicant must submit a new application.

The 30-day active life of a Zurn application is the subject of complaint paragraph 13(b), denied by Zurn, which alleges that at all material times Zurn has "maintained a policy whereby applications are only considered for 30 days after they are received." The complaint further alleges (para. 13c) that Zurn applied that policy to avoid hiring union members and organizers. Such application, paragraph 15 alleges, violates Section 8(a)(3) and, derivatively, Section 8(a)(1) of the Act. Zurn denies.

The size of the record and the length of the briefs has generated mistakes in the briefs. For example, Zurn states that the General Counsel's brief does not mention the 30-day issue. But it does, at page 8 footnote 7. Similarly, the Union argues (Br. at 47) that Zurn's 30-day policy is not contained in the February 24, 1992 memo (GCX 124) by Walter Neal concerning Hiring Procedures and Guidelines. In fact the topic appears as item 3 on the very first page. (Mace did not recall its being in writing, 14:3231, but that does not render the Union's statement and reference to GCX 124 any less of a mistake.)

Asked Zurn's rationale for having the 30-day policy, Mace explained (14:3164):

> The reason for that is, again, the construction business is a very transitory business. People many times are in an area looking for work, or they have addresses that change frequently. They have telephone numbers that change frequently.
>
> You know, a 30-day period, generally, in the case, if that person has not been able to find work within that 30-day period, they probably have moved on or they may have found some other kind of work.
>
> So, that time frame is what the company feels is an appropriate time period for that application to be active.

And Joseph Murray, a veterans representative at FJS, testified that it is a "very common" practice for employers to have an active period, including terms of 30, 60, or 90 days, stated on their employment application forms. (4:1014.)

H. Overall Hiring Statistics at the Florida Jobsites

That brings us to some overall hiring statistics for the three projects. Keep in mind that, as of the May 10, 1995 close of the trial, only the Auburndale project was complete. As shown by the brass log for Auburndale (RX 12), Zurn hired, or rehired, 353 hourly employees (including clerks and general foremen) beyond the first 50 brass numbers reserved (6:1403–1404; 14:3143) for salaried employees. With the exception of the safety technician (brass 53), and some clerks (a half dozen or so), all those on the list worked in the various crafts. For the purpose of computing the percentage of priority hires, however, I count all 353. Of the 353, most were either a name call (284) or (11) former Zurn employee but not a name call (brass 182, 201, 204, 210, 213, 219, 220, 249, 259, 320, 321). Stated as a percentage, the numbers mean that the 295 priority hires represent over 83 percent (83.57 percent) of all hourly employees hired for Auburndale. Nevertheless, Zurn argues (Br. at 20,

106–107), the priority hire policy resulted in only four named discriminatees (boilermakers Bragan, Freeman, Juncal, and Newsome) not being hired at Auburndale.

At Bartow (job unfinished at close of hearing) the numbers from the brass log (RX 13) are similar. Thus, of 314 hourly employees hired, most (258) were either former employees (211) or name calls who were not former employees (47; Zurn counts 53, Br. at 45), yielding a priority hire percentage at Bartow of over 82 percent (82.17 percent). Manager of Personnel Walter Neal confirms that the majority at Bartow were from other Zurn jobs, that he did not have enough positions at Bartow to hire all those with priority hire status (6:1366, 1374–1376; 16:3774), and that most of those hired at Bartow were from followings (6:1428.)

Zurn asserts (Br. at 45, 106–107) that only one named discriminatee (carpenter Damon Allen) was rejected at Bartow as a result of Zurn's priority hiring policy. Even so, Zurn observes that it hired at least 10 union members and organizers at Auburndale and Bartow.

The Mulberry job was still in progress as of the close of the hearing. Moreover, the brass log for Mulberry (RX 14) shows fewer brass numbers and names hired for Mulberry than does a list in evidence of applicants hired (CPX 12s). From that list (CPX 12s), Zurn (Br. at 67) counts 247 craft employees hired at Mulberry, with 91 being prior Zurn employees and 56 being PPE employees (a special priority category for the Mulberry job, as I describe when I discuss Mulberry), for a preliminary priority hire percentage of over 59 percent (59.51 percent). The Mulberry brass log does show, however, that there were at least 27 name calls of applicants who are not marked as also being prior Zurn employees. When the 27 are added, the percentage of priority hires at Mulberry rises to over 70 percent (70.45 percent). The point is that a big majority of those hired at Mulberry were priority hires, and Zurn acknowledges on brief that at least a majority of the hourly employees hired at Mulberry were priority hires. I turn now to the alleged refusal to hire at the three Florida jobsites.

I. Refusal to Hire

1. The allegations

Complaint paragraph 11(a) alleges that Zurn "refused to consider for hire" a total of 37 employees: 1 on August 16, 1993, 18 on August 17, 1993, 17 on February 18, 1994, and 1 on April 11, 1994. Such refusal to consider for hire, complaint paragraph 11(b) alleges, was because of the union activities of the alleged discriminatees, and to discourage employees from engaging in union activities. Zurn denies. The 37 are (the 4 italicized names marked by an asterisk denote paid staff persons for one of the unions, as further explained below):

August 16, 1993

Frank Chapman

August 17, 1993

James A. Bragan*	Timmy Brayton
Danny Busbee	William R. Earley
Jerry D. Freeman	Leo C. Howlett
Frank D. Hughes	**Camilo Juncal***
David K. Kennedy	Danny Lewis
James R. Lewis	Billy R. Milligan
Richard M. Moore	Emory L. Newsome
Richard R. Raulerson	Luther A. Smith
Jimmy D. Steen	David Yates

February 18, 1994

Damon Allen	Ronald Ballentine
Grady "Larry" Brown*	Teddy Casey
Morris Dennison	Dennis Franks
Sean Gaffney	James Gardner
Bobby Givens	Robert Hall
Dale Hunt	Carl Jones
Larry Jones*	Charles McCaul
John Palmer	Gary Smithers
Sam Sullivan	

April 11, 1994

Dan Beardsley

Complaint paragraph 12 introduces the refusal-to-hire allegations. Paragraph 12 alleges that Zurn refused to hire Sam Sullivan about February 18, 1994 (par. 12a), Lawrence Roberts about May 24, 1994 (par. 12b), Camilo Juncal (par. 12c) and James A. Bragan (par. 12d) about October 11, 1994, and (as added at trial, 16:3606) Glen Thornbury about November 2, 1994, because, paragraph 12(f) alleges, of their union and concerted activities. Zurn denies. [Although the motion (GCX 153) to add Thornbury refers to November 1995, consistent with the amended charge (GCX 150) and the obvious, I show the correct year of 1994.] Thus we have these additions:

Additional 1994

Sam Sullivan	February 18
Lawrence Roberts	May 24
James A. Bragan*	October 11
Camilo Juncal*	October 11
Glen Thornbury	November 2

Although complaint paragraph 12 lists five names, three (Sam Sullivan, Camilo Juncal, and James A. Bragan) also are named in paragraph 11. That gives us a total number of 39 individual applicants named in the complaint.

As the record reflects in detail, James A. Bragan and Camilo Juncal are full-time paid staff organizers of the Boilermakers as is Grady "Larry" Brown of Iron Workers Local 397, one of the Charging Parties, and (James) Larry Jones of Carpenters Local 140, another Charging Party. (Actually, Jones holds the positions of business manager and financial secretary of Carpenters Local 140.) Grady "Larry" Brown is a full-time, salaried official of Iron Workers Local 397. Respecting these salaried representatives, Zurn defends, in part, on the ground that, because of their paid capacities, they are not bona fide employees or job applicants. I shall devote no further time discussing this defense because in several cases the Board has found such persons to be bona fide employees. I treat them as such here. The legal question currently is pending before the United States Supreme Court, in the case of *NLRB v. Town & Country Electric,*[8] with a decision likely to issue at any time during its 1995–1996 term. The Court's decision will resolve the issue. Because a legal question attends the status of paid staff of a union, and that status distinguishes Bragan, Juncal, Jones, and Brown from the other alleged discriminatees, I have placed an asterisk by each of their italicized names, on the list of 37 above, to indicate that the question of whether paid union staff are to be, or not to be, considered as bona fide employees will be determined by the Court in *Town & Country.*

[8] 309 NLRB 1250 (1992), enf. denied 34 F.3d 625 (8th Cir. 1994), cert. granted 513 U.S. 1125 (1995).

Earlier I referred to complaint paragraph 13(a) which restates Zurn's national policy for priority hiring. Zurn admits that allegation, but denies that it has (complaint par. 13b) "additionally maintained a policy whereby applications are only considered for 30 days after they are received."

Turn now to complaint paragraph 13(c), which alleges, in part, that Zurn applied its hiring policies, on the dates specified in paragraph 11 (and "at various other dates since April 8, 1993, more specific dates being unknown to the [Regional Director] at this time"), "to avoid hiring union members and organizers. . . ." In short, paragraph 13(c) is an open-ended allegation of a refusal to hire. Complaint paragraph 11(a) alleges a refusal to consider for hire. The Board treats demonstrated refusals to consider as unlawful. See *Ultrasystems Western Constructors,* 310 NLRB 545 (1993); *D.S.E. Concrete Forms,* 303 NLRB 890, 896 fn. 23 (1991). At least one court, however, has questioned the legal viability of such a concept if the refusal to consider is not connected to job availability. *Ultrasystems Western Constructors v. NLRB,* 18 F.3d 251 (4th Cir. 1994). For the most part, any question here is mooted by the all-encompassing reach of complaint paragraph 13(c). Although in theory the concepts alleged remain separate in this case, as a practical matter this is a refusal to hire case, and the briefs, in effect, so treat it. No party asserts that there is even one individual who allegedly was denied consideration without, at the same time, having been unlawfully denied employment. It is clear that the operative allegation is that of refusal to hire.

The General Counsel and the Union attack with a quiver containing three major arrows. First, they argue that FJS is Zurn's (general) agent. Second, they argue that animus is reflected by the 8(a)(1) threats (allegations which I have dismissed). For their third arrow they argue circumstantial evidence including, especially, Zurn's priority hiring system.

2. Auburndale

a. 511R cards

Record evidence describes the 511R cards (sometimes 511s herein), double-sided and a bit larger than 5 by 8 inches, as internal documents of the FJS. FJS Supervisor Yvonne Jordan testified that FJS used them as prescreening forms even before Zurn arrived. (18:4066.) Neither Jordan nor, so far as she knows, anyone under her supervision, ever sent any 511R cards to Zurn. (18:4066, 4069–4070.) Jordan acknowledges that she did not supervise everyone who processed Zurn applications and conducted interviews of Zurn applicants. (18:4167.)

As we see in a moment, in August 1993 FJS gave 511s (the cards bear the title, "Applicant File Card—Recruiting Agreement") to some of the applicants who sought employment with Zurn. The cards had "Zurn" handprinted in red in the upper right hand corner in the block, number 13, for the Employer. Although neither the General Counsel nor the Union disputes that the 511R cards are FJS' internal documents, they argue, in effect, that Zurn is bound by the actions of its agent, FJS, in using the cards, and that the cards therefore serve as valid Zurn applications. They also refer to an alleged statement attributed by Union organizer Juncal (3:556) to FJS Veterans Representative Anderson on August 23 to Juncal that Personnel Supervisor B.J. Malone was that very day at the FJS [which in fact he was] in an office, behind a closed door, inspecting a box of 511s. Bragan testified (3:641) that Anderson said "applications" and that Bragan then filled out an "application" (a Zurn application. (GCX 32.) Although at times Bragan refers to the 511s as applications (3:631, 633), at other times it is clear that he is referring to Zurn's application forms, not to the 511s, and that he made the distinction. (3:641–642, 736–737, 749.) For this occasion it is possible that Bragan was referring to both. Whatever he was referring to, Bragan concedes that he did not see Malone reviewing either one. (3:739–740.) Moreover, as Bragan quotes Anderson as saying that Malone was then in the back room reviewing "applications," and as FJS was using Zurn's application forms, any reference by Anderson to "applications" could well have been to the Zurn application forms. Anderson did not testify, but I credit Malone who denies reviewing any 511s at FJS on August 23. (17:3807–3808, 3967.)

Juncal testified (2:226, 231–232; 3:554–555, 615–616, 621–622) that on August 24 several FJS representatives, including Director Flynn and Supervisor Jordan told him and Bragan that (1) the 511s were used for applications, and (2) that both Jordan and Flynn said the 511s would be used not only for the Auburndale job but also for Zurn's upcoming Bartow job as well. Bragan confirms this as to Director Flynn (3:645), although he puts his conversation with Jordan as to this on August 17 (3:629, 639.) Jordan denies (18:4071–4072), but may have the event confused with an October 1993 conversation with Juncal. Flynn did not testify. While I credit Juncal and Bragan respecting this point, it is clear, and I find, that FJS representatives were referring to their own prescreening procedures, and they were not stating that the 511s would suffice as a substitute for Zurn's application form. Indeed, Juncal and Bragan filled out Zurn application forms (GCXs 30, 32, respectively) on August 23, 1993.

In any event, it is undisputed that, about September 1, FJS posted a notice (Jordan testified that FJS Director Flynn had it posted, 18:4068), dated September 1, 1993, reading (GCX 45):

NOTICE

ZURN-NEPCO

- Due to the near completion of their current project, all future openings with ZURN-NEPCO will be posted in the computer and JIS [Job Information System—the public computers in the lobby. 4:892; 18:4040].
- All applicants who have filled out the Job Service Applicant File Card 511R, will be maintained through September 30, 1993 ONLY.
- Job Service is NOT ACCEPTING any general applications of interest (511R) for ZURN-NEPCO. All openings will be on the JIS computers.

Posted September 1, 1993

FJS Supervisor Jordan testified that at this time FJS quit taking 511s for Zurn and screened from Zurn applications and job orders from that point. (18:4068.) In view of the foregoing, and all the record, and crediting Jordan and Malone, I find that the 511R cards were internal documents of the FJS, that the 511s never became substitutes for applications on Zurn application forms, and that Zurn never became bound by FJS' internal use of the 511s. Moreover, FJS notified applicants, by the September 1 posting (GCX 45), that, in effect, all 511s for Zurn would become invalid after September 30, 1993.

b. August 16, 1993—Frank Chapman

(1) Facts

As listed in the introduction to this section on the alleged refusal to hire, Frank Chapman is the only person allegedly dis-

criminated against on August 16, 1993. On Monday, August 16, Union (Boilermakers) Organizers James A. Bragan and Camilo Juncal, accompanied by boilermaker Frank Chapman, went to the FJS office at Lakeland. Only Chapman entered the office. Moments later, carrying a blank 511 card, Chapman emerged and, in the parking lot and in the presence of Bragan and Juncal, Chapman, who did not testify, completed the 511. In so doing, Chapman wrote "Voluntary Union Organizer" at the bottom of the reverse side of the card in the space calling for a listing of any other special skills or qualifications. Juncal took the completed form (GCX 6) and made copies. Minutes later, Juncal and Bragan watched as Chapman returned his completed 511 to the receptionist (Mattie Lewis) who placed the card in a box on her desk. (2:175–180; 3:565–566, Juncal; 3:627–628, 741, Bragan.) Mattie Lewis confirms that, because of so many inquiries around this time about Zurn, a box was kept on the desk just for 511s for Zurn and that, from time to time, she placed completed 511s in that box. Lewis further testified that supervisors and interviewers would come and review the 511s on occasion.

(2) Conclusions

Although Chapman's 511R card (GCX 6) reflects that he is a military veteran, that he had completed a 4-year boilermaker apprenticeship training at the Union, that he had welding and pipe welding experience, and that he was applying for boilermaker, pipefitter, and ironworker, among other jobs of interest [standard FJS procedure is to enter no more than three job interest categories on the computer], he never, so far as the record shows, took a number to be interviewed, was never interviewed by a veterans representative, was never registered on the FJS computer, never completed a Zurn application, and was never referred by FJS to Zurn for a job interview. In short, it is as if Chapman was never at FJS on August 16.

There is no evidence that Chapman's 511R card was ever presented to Zurn for consideration as an application. Indeed, the evidence compels the finding, which I make, that Zurn never saw Chapman's 511R card. That finding alone dictates dismissal of the complaint as to Chapman. Going further, however, I note that neither the General Counsel nor the Union explains why Chapman should be considered a discriminatee even if Chapman's 511R card were deemed to satisfy the requirements of a Zurn application. Neither points to any evidence demonstrating that Zurn considered (or refused to consider) and rejected Chapman. The Auburndale brass log (RX 12) reflects that, of six employees hired that August 16 by Zurn, only one, Ronald D. Butler, was among the first three skills listed by Chapman—Butler was hired as a pipefitter journeyman (RX 12 at 22, brass 285). Butler's August 10 application (RX 65) reflects that his last work had been as a pipefitter foreman on a Zurn job. And that brings up the critical fact that all but one (an instrumentation general foreman) hired that day were in the priority category of prior Zurn employees.

The next person hired was not hired until August 23. On the possibility, therefore, that a walk-in on August 16 may not have been hired before August 23, I shall consider Chapman in comparison to those hired on August 23. Only one person was hired on August 23—William Vallotton, brass 290, hired as a pipefitter journeyman. (RX 12 at 23.) Vallotton, hired the same day as his August 23 application (RX 76), states on his application that he has 20 years' experience as a pipefitter, with part of his experience having worked for Zurn in 1992 in New York and in Maine. The brass log reflects that Vallotton was a priority hire, being both a former employee and a name call. The record reflects that Zurn usually called FJS and advised that a name call would be coming by on a certain date. This smoothed the way for the arriving name call to obtain and complete a Zurn application and to be screened by FJS.

As the evidence fails to establish even the hint of a prima facie case that Zurn discriminated against Chapman because Chapman had placed the phrase "Voluntary Union Organizer" on his 511R card, I shall dismiss complaint paragraph 11(a) as to Frank Chapman.

c. August 17 and 24, 1993—19 boilermakers

(1) Facts

As I listed in the introduction to this section, complaint paragraph 11(a) alleges that on August 17, 1993, Zurn "failed and refused to consider for hire" 18 named employees. Complaint paragraph 13(c) alleges a refusal to hire on August 17 (among other dates, including August 24, 1993).

(a) August 17, 1993

The 18 are boilermakers, and they include Union Organizers Bragan and Juncal. After his August 16 visit to FJS, Juncal called several members of Boilermakers Local 433 (Tampa) who were out of work. Of those he called, 15 joined Bragan and Juncal at FJS the morning of August 17. Although paragraph 11(a) names Danny Lewis as one of the 18, he is not one of those named by the other witnesses as present that morning at the Lakeland office of FJS. Juncal (2:193) identified the 511R cards (GCXs 10–24) of the 15 as being those of the "guys who were there" the morning of August 17. None of the 15 cards is for Danny Lewis. (2:193–195.) Although Juncal was asked about the skills of Danny Lewis (3:497), Juncal never names Danny Lewis as being present on August 17. (Juncal did, as I discuss when I reach August 23, list Danny Lewis as being present on that date.) As there is no evidence that Danny Lewis was present on August 17, I shall dismiss complaint paragraphs 11(a) and 13(c) as to him for August 17, 1993.

Respecting the 15 remaining boilermakers besides Bragan and Juncal, the evidence shows that they completed 511R cards (GCXs 10–24; entering "Voluntary Union Organizer" or equivalent on them) which were placed in the Zurn box on the desk of the receptionist. The 15 then left without being interviewed or (2:203; 3:568) registered on the FJS computer. After lunch Juncal and Bragan returned to FJS, submitted their own 511s (GCXs 25, 26), met with Veterans Representative Bill Anderson who gave them his card (GCX 27) and registered them on the computer.

For the three DOT (Dictionary of Occupational Titles, 4:927) codes FJS allowed on the computer (2:201; 4:969), Bragan (2:201; 3:634) and Juncal (2:208, 429; 3:568) testified that they chose boilermaker, pipefitter, and pipe welder. At the request of Bragan and Juncal, Anderson checked the computer and the screen revealed that the only job order open for Zurn was for laborer and that a pipe welder order from Zurn was on hold. (2:205–206; 3:569, 636.)

Juncal (2:207) and Bragan (3:638) testified that, before they left FJS that August 17, Bragan had a separate conversation with Yvonne Jordan. Director Flynn was not at the office. According to Bragan, in Jordan's office he showed Jordan a copy of a February 19, 1993 internal two-page memo (GCX 49) from the manager of the District V Customer Service of the Michigan Employment Security Commission (MESC) to the deputy

director. The memo describes MESC's version of its experience with Zurn, makes some reference to an allegation against MESC of interrogation in the Cadillac case, and advises that its current procedure is to refer to Zurn on a FIFO basis (first registered, first referred). Bragan told Jordan that MESC had been named in the complaint as an agent of Zurn in the Cadillac, Michigan case, and that he wanted fair and equitable treatment for members of the Union. Jordan said she was not aware of the Michigan case, that she understood Bragan's concern, and she assured him that he and the others would be treated equitably.

Bragan also asked about the 511R cards, asking for assurance that such cards would be adequate for consideration for hire by Zurn. Jordan said yes, that such cards would be adequate not only for the current job but also for Zurn's upcoming job in Bartow. (3:631, 638). On cross-examination (3:742–743), Bragan appears to link the 511R card portion of the conversation to a similar conversation which he reports having with FJS' Bill Anderson on August 23 (3:640, 643–644). An August 25, 1993 letter from Bragan (also signed by Juncal and the Local's business manager) to Zurn's B.J. Malone (copy to FJS Director Flynn) addresses the 511s. The first page of text, from the over two-page letter, reads (GCX 39):

> For your information, on August 16 and 17, 1993 the below listed members of the Boilermakers Union submitted applications for employment at the job service in Lakeland, Florida for Z-N project in Auburndale, Florida. They each applied as Boilermaker, Pipefitter, Ironworker and welder if applicable. Each was given form 511R (9/86) 481 and had ZURN in red ink written on the top right corner of the application.
>
> Cam Juncal and myself applied last and I assume, since we were Veterans [,] we had the opportunity for a personal interview with Bill Anderson, Veteran representative. He stated that we would not be considered for hire unless we were entered into the computer and only Veterans receive this privilege. Nevertheless, after entering our names, he told us there was a hold on Boilermakers and Pipefitters at the time.
>
> [The third paragraph is a listing of all 19 names, including Frank Chapman, and stating that Danny Lewis actually applied on August 24, but that no copy of the Danny Lewis application was available. Of the 19, 10, including Chapman and Danny Lewis, are identified as veterans.]
>
> Concerned for the other members who applied, I asked to see the director. After being told he was not in, I was referred to, I assume, the Assistant Director who was an older woman. She assured me that those small white cards [the 511s] were sufficient for consideration for employment by ZURN Nepco.

Malone's reply letter of September 20 (the copy in evidence, GCX 43, is addressed to Juncal) reads:

> This is to acknowledge receipt of your letter of August 25, 1993. Your letter contains many inaccuracies. Needless to say, as you know, we accept employment applications solely through Job Service. Therefore I am returning the applications you sent.

As we see shortly, Bragan had enclosed, in the Union's letter, copies of 511s and some "generic" applications submitted through August 24. Later I describe Yvonne Jordan's testimony concerning Bragan's assertions about meeting with her.

(b) August 23, 1993

On August 20, FJS Veterans Representative Anderson (and possibly Joseph Murray, 4:981) telephoned Juncal three times, leaving messages for him and Bragan to come apply for an open Zurn job order for boilermaker journeymen. After returning to Tampa and playing his messages, Juncal notified Bragan and then, on Monday, August 23, called Anderson who confirmed the openings. Juncal arrived at FJS around 10:30 a.m. accompanied by boilermaker and welder Emory L. Newsome. Newsome is one of those who filed 511s on August 17. Juncal took Newsome because he did not know whether Bragan would arrive in time that day to apply. (2:214–217; 3:570.)

At FJS, Juncal and Newsome met with Anderson who told them there were open job orders for boilermaker journeyman and pipefitter journeyman positions. Following FJS' procedure, Anderson gave each two Zurn application forms, one for each open position. Each completed two applications. On his application Juncal identified his union employer and described his job duties as "Union Organizer." Newsome's application (GCX 31) shows, in bold print on the first page, in the title block for Education/Skills, "Vol. Union Organizer." Juncal asked Anderson what he was going to do with the applications. Anderson said he would put them in the box. He did so and said that Zurn would receive them. (2:220–221.) In fact, B.J. Malone testified, Malone received the four applications (RXs 55–58) from FJS with FJS form 516, "Applicant Referral Form," attached at the top (as the covering page on the copies in evidence). (17:3812, 3814.)

The papers for Juncal reflect that he was being referred for pipefitter journeyman (RX 55) and boilermaker journeyman (RX 58), and that Newsome was being referred for pipefitter journeyman (RX 56) and boilermaker journeyman (RX 57). The date on each 516 referral card is August 23, 1993. [I use the documents which Malone received from FJS, in evidence as RXs 55 and 58 (Juncal) and RXs 56 and 57 (Newsome), rather than those in evidence as GCXs. For one reason, FJS may have added, to Juncal's applications, the skill job for which he was applying. 18:4207–4208.]

Recall from an earlier summary that boilermaker Jerry Freeman met that same August 23 with Veterans Representative Joseph Murray. (Earlier I dismissed an 8(a)(1) allegation against Murray concerning the Freeman interview.) On August 23 FJS also referred Freeman's application with the 516 referral card attached. (RX 59; referred for boilermaker journeyman.).

Later that day Juncal picked up Bragan at the Tampa airport and drove him to FJS where they arrived about 4:30 p.m. (2:221–222; 3:571, 640.) Anderson said the jobs were now on hold because Malone was there behind closed doors reviewing applications. Bragan nevertheless persisted, and Anderson gave him an application. As Bragan was filling out the application, Malone emerged. Recognizing Malone from the Philadelphia trial regarding the Pedericktown, New Jersey job [316 NLRB 811 (1995)], Bragan greeted Malone and asked him to wait until he had completed his application because Bragan wanted to work for him. Malone said he was too busy to wait (it was his first day on the Auburndale job and he had come to meet the FJS personnel), but to leave the application and Malone would get it later.

On August 23, FJS referred the applications not only of Juncal and Newsome, as I have described, but also of Jerry Freeman (RX 59) and James Bragan (RX 60, referred for boilermaker journeyman). On his application, Bragan identifies him-

self as employed by the Union as an "Intl Rep./Organizer" with the duties of a union organizer. (RX 60 at 3.)

(c) Malone's credibility attacked

For some reason, the Union (Br. at 16) argues that Malone "denied knowing who Bragan was on August 23, 1993, when he met him at the FJS office. (17:3914–3916, Malone.) However, Malone conceded he remembered who Bragan was later that day. (17:3914–3916, Malone)." In fact, from the start of this point, Malone testified that, although he could not recall who Bragan was [that is, his name and job], "I knew the face." (17:3909.) "I recognized his face, but I could not remember his name." (17:3918.) After trying to recall Bragan's identity, and saying to himself, "I know that man from somewhere," Malone recalled Bragan's name later that day. (17:3909–3910, 3918.)

The Pedricktown trial occurred in 1992 (316 NLRB 811 at 813), over 3 years earlier. Since that time Malone, as a personnel supervisor for Zurn, has seen hundreds of applicants, perhaps a few thousand. For most persons, it is not at all unusual to recognize a face not seen for 3 years, but to be unable immediately to place the person or recall his or her name. Any highlighting of that temporary inability would simply be an ineffective argument. The Union goes further, however, and asserts that Malone "denied knowing" Bragan, and that Malone only later "conceded" remembering Bragan later that day. Such an argument is very inappropriate. Moreover, this technique of arguing is prefigured in the Union's opening statement. The Union there characterizes Malone as the "infamous B.J. Malone, the violator of the National Labor Relations Act." (1:48.) Given that all allegations in **Zurn Nepco 2** [the Pedericktown case] against Zurn and Malone were dismissed, save the single technical 8(a)(2) violation, and Malone is not mentioned in Judge Snyder's decision, **Zurn Nepco 1**, it seems grossly unfair to imply during the opening statement here that elsewhere [Pedericktown] Malone had been found guilty of acts involving, it would seem, antiunion animus and illegal motivation or, at the very least, several unlawful threats.

Respecting Malone's credibility, the General Counsel argues (Br. at 23) that Malone was a "fast talking, whining witness who was quick to anger." As a witness before me, Malone at times rambled and mumbled, and on two or three occasions became upset. Given that this is yet another trial in which Malone has had to defend his actions, that he would become upset on occasion is understandable. Very few enjoy the unenviable position of being in the witness chair for several hours and enduring questions concerning their actions. I did not see Malone in the light portrayed by the General Counsel. Instead, Malone appeared to me to be a sincere witness, and I generally credit him even though on one or two points I may accept the version of another witness where Malone was less persuasive.

(d) August 24, 1993

Complaint paragraph 13(c) alleges that, about August 24, Zurn applied its policies to refuse to hire union members and organizers. Specifically, that includes the 19 named in paragraph 11(a). I have dismissed Frank Chapman as to the August 17 allegation, and as he never completed a Zurn application or was referred by FJS, I likewise dismiss the complaint as to him respecting August 24. As I describe in a moment, Danny Lewis—erroneously named among those for August 17—is reported as submitting a 511R card on August 24.

On Tuesday, August 24, Juncal, Bragan, and eight members of the Union returned to the Lakeland office of FJS. The purpose of the visit, Juncal testified (2:226–227) was to try to get the veterans registered on the computer and also to get registered the other ones for they had submitted only 511R cards. Bragan and Juncal were concerned that only those registered on the computer would be called. Danny Lewis was one of the eight. Although a couple of the witnesses also name Jerry Freeman as one of those present on August 24, Freeman testified that he did not return after August 23 because he was working. (10:2140.) I therefore do not count Freeman as among those present on August 24, 1993. The other seven (David Kennedy, Lee C. Howlett, James Lewis, Billy Milligan, Richard R. Raulerson, Luther A. Smith, and David Yates) had been there on August 17. Of the eight, four were military veterans: Danny Lewis, James Lewis, Richard Raulerson, and Luther Smith. Each of these four was interviewed by a veterans representative. When Luther Smith asked Veterans Representative Anderson about openings at Zurn, Anderson checked the computer and told Smith that the only open job order was for a laborer, that the job order for pipefitters was filled, and that the order for boilermakers was on hold. (6:1254, 1276, 1280.)

Juncal testified that, during this August 24 visit, FJS Supervisor Jordan told him that the 511R cards were good not only for Zurn's Auburndale job, but also for the upcoming Bartow job, and that Director Flynn, who was standing there, "reaffirmed" Jordan's statement. (2:226, 231–232; 3:615–616, 621–622.) Juncal's notes for the day (GCX 36) confirms as to "a lady" (Jordan, presumably), but are silent as to any statement by Flynn on the topic. Bragan confirms as to Flynn, rendering it that Flynn "assured us" that the cards were sufficient for him by Zurn and "he also added" that the cards would be utilized for the Bartow job as well. (3:645.) Bragan does not list Jordan as being present or saying anything. Flynn did not testify.

Bragan testified that, at some point on August 24, he telephoned Zurn's Auburndale jobsite and spoke to Malone. He told Malone that his application was in the box [at FJS] and that he expected to be called to be hired. Malone said he had just transferred in, that he was very busy, that he was not sure what skills were needed or when, and that he would contact Bragan. Malone never did. (3:646–647.) Malone did not address this during his own testimony. I credit Bragan's account of his August 24 telephone conversation with Malone.

On August 25 Juncal telephoned the Auburndale jobsite and spoke with Malone. After Juncal inquired whether Zurn was hiring, Malone said he had just transferred from Umatilla and that he did not know. Juncal then identified himself, said he was a welder and a boilermaker, that he wanted to go to work, that he had been to FJS, and that he had been referred to the Auburndale job. Malone then said he did not see how Juncal had been referred because the boilermaker position had been filled. Juncal responded that he thought the position was merely on hold. Malone mumbled something and said that he would be needing people at Bartow. Juncal said he would be checking with Malone. (2:275–277.) Malone does not address this conversation. I credit Juncal.

Juncal then called Veterans Representative Anderson at FJS and asked about the status of job calls from Zurn, confirming what Luther Smith had told him the day before, that the fitter's job was filled and the boilermaker's job was on hold. (2:282–283.)

Earlier I referred to some correspondence between the Union (Bragan, Juncal, and Edgar Lariscy, the Local's business manager) and Zurn's B.J. Malone. The Union's August 25 letter

(GCX 39) named the 19 boilermaker applicants of August 16, 17, and 24, enclosed copies of their 511s (stating that no copy was available for Danny Lewis), identified the veterans, and closed by stating (GCX 39 at 3):

> Today, Wednesday, August 25, 1993, you informed Cam Juncal over the phone that the Boilermaker position was filled and you weren't hiring. The job service states the Boilermaker is on hold and the Pipefitter was filled.

As earlier noted, Malone's September 20 response (GCX 43) is short. In it, Malone asserts that the Union's letter has many inaccuracies, reminds the Union that Zurn accepts employment applications "solely through Job Service," and returns the papers. (GCX 43.) Also as mentioned earlier, the record reflects that, on August 23, FJS took Zurn applications from 4 of 19 Boilermakers—Bragan, Juncal, Freeman, and Newsome. None of the other 15 ever completed a Zurn application, and none of the 15 ever was referred by FJS.

(2) Conclusions

When Zurn's 30-day active application rule, the August 23 applications of these four were active through September 22, 1993. (As Malone testified, 17:3823, the actual hiring need not have occurred during the 30 days. It is enough that processing of the application have begun during the 30 days.) The record shows that, during these 30 days, Zurn hired only one boilermaker journeyman—Robert Gould, brass 298 on the Auburndale log (RX 12 at 23). As the log and the Personnel Payroll Action Document (RX 83 at 3) show, and as Malone testified (17:3853, 3935), Gould was a priority class hire, or rehire, having previously worked on other Zurn jobs. Although Jeremy Styles, brass 299, was hired on September 16 as a boilermaker helper 3 at $6 per hour (RX 12 at 23), Malone testified that he did not consider any of the four (Bragan, Juncal, Freeman, Newsome) for a helper 3 job because they were journeymen applicants. (17:3814.) Indeed, as already noted, FJS referred them for journeyman positions. As Zurn's management witnesses credibly testified, Zurn has a policy of not hiring an applicant at more than one level below his referral level. The reason is clear: an experienced journeyman, for example, will be unhappy at such lower levels (pay and job assignments) and will leave for another employer at the first opportunity to obtain journeyman's pay. The policy allows for hiring at the next lower level (helper 1 in the case of a journeyman referral), but frequently that is with the hope, even understanding, that a journeyman position will be available soon. (8:1735; 17:3814, Malone; 14:3170–3173, 3238, Mace; 15:3284–3285, 3430, 3518, Brigham; 16:3737–3738, Neal.)

During this 30-day period, Zurn also hired three journeymen pipefitters (RX 12 at 23)—William Vallotton, brass 290, on August 23; Paul Hurni, brass 297, on September 8; and Jeffery Price, brass 300, on September 17. As the three hired were prior Zurn employees (RXs 76, 73, 74), each was accorded Zurn's priority hire classification. (17:3832–3834, 3840–3845, 3871, 3928.)

With one exception, Malone hired no one at Auburndale who had not first registered at FJS. (17:3873.) The exception, Malone acknowledges (17:3861, 3870, 3981–3982, 3984, 3997–3998), resulted from his misunderstanding of Zurn's hiring policy. Malone had understood that, as in the case of this exception (Herschel Owen, brass 248, hired July 6, 1993, fired August 26, rehired as a millwright journeyman November 1, 1993; RX 12 at 21, 24), a new application and registration at FJS was not necessary when the applicant was a rehire from the same project. Later, Malone's misunderstanding of Zurn's policy was corrected.

Moreover, Malone persuasively testified that, of the 19 alleged discriminatees, he received 516s (referral cards) and Zurn applications from FJS for only the 4, Bragan, Juncal, Freeman, and Newsome. (17:3819–3820, 3971–3972.) Malone knows this particularly as to the 19 (actually, the 15 not referred are the relevant focus here) because, although he normally discarded applications at Auburndale after 30 days and did not keep 516s, he kept them for this group. He retained the papers because, after the Union's letter of August 25, enclosing the 511s, he anticipated court trouble. (17:3900–3901.) Although at one point Malone said he could not answer whether the papers he discarded could have included those of the 15 (17:3976–3977), he elsewhere, as I have cited (plus 17:3993), makes clear that he retained all papers for those named in the Union's letter of August 25, they being the 19 named in the original charge (GCX 1a). All this is a tangent anyhow, for there is no evidence that any of the 15 completed a Zurn application and was referred by FJS. In fact, the evidence is to the contrary. Malone did not consider the 511s because he returned them with the reminder that Zurn accepts only Zurn applications, and even they have to be screened and referred by FJS.

Not one of the witnesses from FJS testified that he or she brought up the subject of a union with any applicant. Each of the FJS witnesses credibly testified that he or she does not discuss unions with applicants even when an applicant mentions that he is a union member (4:808, Jaisarie; 4:906, M. Lewis); or seeks to determine whether an applicant is a union member or supporter (4:899, M. Lewis; 18:4042, 4044, Jordan; 18:4189, Franceschi); or that anyone from FJS, and specifically the personnel supervisors, ever told him or her that Zurn did not want union members referred (4:809, Jaisarie; 4:905, M. Lewis; 18:4125–4128, Jordan; 18:4186–4189, Franceschi); or that an applicant's membership in a union plays a role in referring the applicant to Zurn (4:975, Murray; 18:4048, Jordan; 18:4189, Franceschi); or that anyone from Zurn ever said he was putting on hold or canceling a job order because applications were by union members (18:4185, Franceschi).

Similarly, Mace credibly testified that he never discussed the union status of job applicants, or any preference by Zurn respecting that status, with any FJS representative, and that no one from FJS had ever informed him that there were union members attempting to register for work. (14:3133–3134.) As already mentioned, Malone credibly testified that the notice of "union organizer" or "voluntary union organizer" on the applications of the four (Bragan, Juncal, Freeman, and Newsome) played no part in the hiring process. (17:3818.)

Finally, instead of discriminating against union members, Zurn hires them. The record reflects that Zurn hired several known union members at Auburndale, with some even being afforded a priority hiring status. For example, Howard Haas, brass 128, was hired at Auburndale as a journeyman electrician on March 8, 1993. (RX 12 at 9.) On the letterhead stationery of International Brotherhood of Electrical Workers Local 915 (IBEW), dated December 15, 1993, Haas advised Zurn (RX 90; a signed form letter):

> I, Howard Haas, do hereby wish to inform you of my intentions to engage in concerted activities as outlined in Section 7 of the National Labor Relations Act, for the purpose of organizing the electrical workers within your company.

Malone received the notice a day or two later (17:3939), but before (17:3992) Patrick Berry was hired. Malone sent a copy to Manager of Personnel Neal at Zurn's headquarters, and Neal filed the copy in Haas' personnel file. (16:3727, 3761, 3771.) Patrick Berry applied on December 16. On his application, Berry states, for prior employment, that he has worked the past 20 years out of the union hall at IBEW Local 915. (RX 92 at 2.) On the face of his application, Berry states that he was referred by Howard Haas. Malone was aware of Haas' status as an organizer. (17:3877.) Berry and Malone both signed the personnel payroll document (RX 92 at 4) reflecting his hire date of December 21. (RX 12 at 25, brass 382.) Malone credibly testified that Berry's 20 years' referral through Local 915 made no difference in the hiring decision. (17:3876, 3987.) The next day, as might have been expected, Berry submitted his own written notice of intent to organize. (RX 92 at 5.)

Later, on December 14, 1994 (RX 13 at 17; 16:3736, Neal), Zurn hired Haas on the Bartow project, where he was afforded a priority classification by his being a prior Zurn employee. (16:3736.) Respecting the union activism matter, Manager of Personnel Neal testified (16:3737):

> Q. When the hiring decision at Bartow regarding Mr. Haas was made, did you have any knowledge concerning Mr. Haas' union or nonunion status?
>
> A. Yes; I was familiar with it.
>
> Q. Okay. What knowledge did you have?
>
> A. I'd seen the—he was one of the individuals that had worked at Lakeland or the Auburndale project, that had indicated his right to actively participate in union activities.
>
> Q. And how did—how had he indicated that right?
>
> A. Through that letter you have there.
>
> Q. Are you referring to Respondent's Exhibit 90?
>
> A. Yes, sir.

Malone credibly testified that the reference to union organizer, or voluntary union organizer, on the applications of the four (Bragan, Juncal, Freeman, and Newsome) played no part in considering their job applications. (17:3818.) I find that there is no prima facie case that any of the 19 named individuals were discriminated against on August 16, 17, or 24, 1993, as alleged, or even through September 22, 1993. Malone testified that all those hired, in the positions for which the four were referred by FJS, were given hiring preference under Zurn's priority hiring classifications set forth in Zurn's policy 303. (7:1634–1637, 1670; 17:3813–3814.) I now shall dismiss complaint paragraphs 11(a) and 13(c) as to all 19 named employees, whose names I listed earlier in this decision, for the dates of August 16, 17, and 24, 1993.

d. October 5 and 8, 1993

(1) Facts

Although complaint paragraph 11 (refused to consider for hire) alleges no further dates in 1993, paragraph 13(c) (Zurn applied policies so as to avoid hiring) alleges "various other dates since April 8, 1993."

The evidence advances now to October 1993. Juncal returned to FJS on October 5. On checking the computer, he discovered a pipefitter opening. Obtaining an interview with Veterans Representative Bill Anderson, Juncal was told the opening was at Zurn but that, because his earlier application was over 30 days old, he had to complete a new (Zurn) application. Juncal did so and observed Anderson prepare a referral card for him. Juncal's October 5 application and the 516 referral card are in evidence (RX 61). Under employment history on his application, Juncal identifies his job title for the Union as "Union Organizer," and describes his job duties as being to "Organize the unorganized."[9] Malone received Juncal's application (several jobs applied for, beginning with pipefitter) and the 516 referral from FJS for the position of journeyman pipefitter. (17:3812, 3817–3818, Malone; RX 61.)

Under Zurn's 30-day policy, Juncal's October 5 application was active through November 4. During those 30 days, Zurn hired four journeymen pipefitters (RX 12 at 23–24; 17:3823–3826, 3829–3831, Malone): Charles Eckhardt, brass 320, hired October 7 (RX 67 at 3); Ronald Geer, brass 338, hired October 25 (RX 70 at 3); Mike Barnes, brass 341, hired October 26 (RX 69 at 3); and Darrell Ereman, brass 345, hired November 4 (RX 68 at 3). Except for Eckhardt, all were name calls as well as former Zurn employees. Although he was a former Zurn employee, Eckhardt was not a name call. Actually, the job order Juncal was referred under is the same as the one for which Eckhardt was hired. (GCX 138b at 49.) Although the same FJS computer generated list shows that Juncal also was hired (GCX 138b at 49), that is in error, for the parties stipulated (4:1001) that Juncal was never hired by Zurn. For reasons I discuss later, I give weight to GCX 138b only to the extent the data is consistent with Zurn documents, such as the brass logs.

Juncal testified that, while he was at FJS on October 5 he had a conversation with Supervisor Jordan. The first topic discussed was the September 1 notice (GCX 45) that, after September 30, 1993, 511 cards would no longer be used. According to Juncal, Jordan explained that FJS and B.J. Malone had conferred and devised the change in policy because of the mixup in the applications. During the conversation, Juncal voiced his concern that FJS had not called him when Zurn submitted job orders. Juncal expressed a concern that the reason he was not being called was discrimination against him because of his union position. According to Juncal, Jordan replied that Florida is a right-to-work State, that Zurn hires whom it wants to hire, that FJS does not discriminate on the basis of age, color, creed, religion, or sex, but that "nowhere does it say anything about unions." Nevertheless, Jordan said that Zurn would receive Juncal's application that evening. Juncal observed Anderson place his application, with a referral slip, in the Zurn box. (2:324–331.)

FJS Supervisor Jordan credibly denies telling anyone that FJS and Malone conferred and devised the change in policy respecting 511. Recall that the 511s were discontinued as to Zurn, as reflected in the notice (GCX 45) posted September 1, 1993. As Jordan persuasively explains (18:4068–4069), it was FJS Director Dennis Flynn who devised the September 1 notice. Malone also denies (and credibly so) having any input other than being called by, as he recalls, Jordan who asked whether he had any objection to posting of the notice (GCX 45). Malone said no. (17:3808–3809.)

[9] In the 80 years since his execution, Joe Hill has become a legend. Earl Robinson's 1938 ballad "*Joe Hill*," setting to music a 1925 poem by Alfred Hayes, "became one of the major factors in the perpetuation of Hill's story." G.M. Smith, *Joe Hill* at 194. But the song, by itself, would not have helped create the legend of Joe Hill had it not been for the stunningly powerful rendition by Paul Robeson. Smithsonian/Folkways, SF 40026, Insert, item 5, to tape, *Don't Mourn—Organize!*

Respecting Juncal's claim that Jordan referred to Florida as a right-to-work State and that, although FJS does not discriminate as to age, color, creed, religion, or sex, "it" [FJS' policy, apparently] says nothing about unions, Jordan crisply denies. (18:4124–4125.) Indeed, Jordan identified several pages from FJS' "Program Guide for Job Service Employer Services." (RX 112.) Jordan testified persuasively (18:4137, 4140) that the following provision has been in effect during all her tenure and that she always follows this policy (RX 112 at 2):

F. Orders in Violation of Law

> 2. Florida's Right to Work law and the National Labor Relation Act make it illegal for an employer covered by either law to specify that applicants must be either a member or non-member of a labor organization (union) in order to be hired. An order specifying such a restriction cannot be accepted unless the employer is persuaded to retract the illegal specification.

Thus, not only did Jordan testify credibly, but she demonstrated that, contrary to what Juncal quotes Jordan as stating, for several years "it" [FJS' policy] has very clearly said something about discrimination against union members. And as we have seen, Juncal's October 5, 1993 application (RX 61) was referred by form 516 to Malone.

In crediting Jordan over Juncal, I have not overlooked Juncal's notes (GCX 48). Made that evening (2:341), Juncal's notes support his testimonial version. I find, however, that Juncal's recollection, and that portion of his notes, attributing to Jordan that FJS' policy says nothing about unions, is an overzealous gloss on a response by Jordan that FJS does not discriminate in its referrals. Although it is possible that Jordan added that Florida is a right-to-work State and that FJS cannot tell Zurn whom to hire, I credit Jordan's strong denial. Moreover, the accuracy of Jordan's version is substantiated by Juncal's admission that Jordan said she would see that his application was forwarded to Zurn. As we know, it was and Malone received it.

On October 8, 1993, Juncal and Bragan returned to FJS for the purpose of updating Bragan's application (RX 60, August 23, for boilermaker or pipefitter) since it was older than 30 days. (2:345; 3:562, 651.) It was late, about 4:30 in the afternoon. (GCX 50 at 1.) Bragan, accompanied by Juncal, met with Veterans Representative Anderson. Bragan's request was denied by Anderson on the basis there were no open job orders for those positions. The only openings, Anderson told Bragan, were for painters and painters helpers. Bragan said no, that he wanted a pipe welder's position.

Saying that he did not think that the union people were getting a fair shake, Bragan then showed Anderson the MESC memo (GCX 49) of February 19, 1993, regarding in part the charges filed in the Cadillac case, and began telling Anderson that Anderson would have to tell the truth when he took the witness stand. Responding that he simply does his job, Anderson summoned Supervisor Jordan, apparently serving that afternoon as, in effect, the acting director. (2:347–348; 3:652–653; 18:4070; GCX 50.)

Bragan then showed Jordan the MESC memo. Jordan said she was not interested in the Michigan case, but only in Florida. Bragan complained that he was not getting referred to Zurn and that charges had been filed against Zurn. [The original charge in this case, GCX 1a, was filed that very day and date stamped at 10:19 a.m.] Jordan, as she credibly testified, pulled up Bragan's data on the computer and said he had been referred. [RX 60, referral to Zurn, dated August 23, for journeyman boilermaker.] Bragan said that if FJS continued to screen out union people that he would see Jordan in court. Jordan explained that FJS does not discriminate against anyone. (18:4070–4071.) Later, Jordan reported Bragan's complaint to Director Flynn, but she does not know whether Flynn conducted any investigation. (18:4168–4169.)

As already noted, after Charles Eckhardt was hired on October 7 (on the same job order under which Juncal, on October 5, was the last referral), Zurn hired three journeymen pipefitters through November 4: Ronald Geer on October 25, Mike Barnes on October 26, and Darrell Ereman on November 4. All three were both name calls and former employees. Under Zurn's priority hiring policy, those three applicants enjoyed a preference over Bragan, who was neither a name call nor a former Zurn employee.

Geer and Barnes were referred under job order FL0925583 dated October 18 (GCX 138b at 56), and Ereman was referred under job order FL0932283 dated November 1 (GCX 138b at 60.) Also, Dencil Truman was referred under job order FL0927085, dated October 15, for pipefitter welder. (GCX 138b at 59.) Truman was hired October 19 as a journeyman pipe welder with a priority preference as a name call and former Zurn employee. (RX 12 at 24, brass 333; RX 81; 17:3848–3849, 3851, 3871, Malone.) Also during this timeframe, including the 30 days from Bragan's October 8 visit to FJS (a 30-day period when Bragan did not have an active application pending as required by Zurn), Joey Neeb, brass 232, was hired October 27 as a journeyman pipe welder. Neeb was a priority class hire, being a name call and a former Zurn employee. (RX 12 at 24; RX 80; 17:3847–3851, 3869–3870, Malone.) He was referred under the same job order that Ronald Geer and Mike Barnes were referred.

Two other priority preference hires referred under the Geer/Barnes/Neeb pipefitter welder job order (dated October 18) were Brian Ledin, brass 343 (name call but not a former employee, 7:1648; 17:3854), and Darron Burrill, brass 344 (name call and a former Zurn employee, 7:1661; 17:3852), with the FJS computer printout showing that they were hired. (GCX 138b at 56.) As his brass number indicates, Neeb previously had worked on the Auburndale project. (GCX 79; RX 12 at 21; 7:1621.) Ledin and Burrill were hired as boilermakers (Ledin on November 2, 1993 (RX 84 at 4; 17:3853, 3856) and Burrill the same date (RX 82 at 3: 17;3851, 3855). Of course, Bragan did not apply on October 18, the date of job order FL0925583, or at any time that job order was open. Because he did not, he had no application on file.

(2) Conclusions

Juncal's October 5 application (RX 61) remained active at Zurn through Thursday, November 4, 1993. However, during that time Juncal apparently did not call either FJS or Malone or visit FJS to check the computer. Juncal therefore did not learn of the October 18 job call. Zurn had no obligation to call Juncal to inform him of the job opening order. The record does not show whether FJS attempted to call Juncal respecting the October 18 job call. Recall that Veterans Representative Anderson called Juncal on August 20 and left messages to contact FJS.

As the evidence fails to establish, even prima facie, that Zurn discriminated against either Bragan or Juncal, or against any of the named discriminatees, on October 5 or 8, or at any time through November 4, 1993, I shall dismiss complaint paragraph

13(c) respecting the period of October 5 through November 4, 1993.

The next contact either Juncal or Bragan had with Zurn was not until a year later, October 1994. In the meantime, February 1994 visits to FJS by the Carpenters and the Ironworkers resulted in the inclusion of more names in the complaint, and I turn now to address February 1994 and the Bartow and Mulberry projects.

3. Bartow[10]

a. Introduction

As I described earlier when summarizing the allegations, in addition to the 19 names the complaint alleges (from the Boilermakers' charge, GCX 1a) to have been discriminated against on August 16–17, 1993 [Auburndale], complaint paragraph 11(a) also names 18 more employees as having been discriminated against (refused to consider for hire), 17 suffering the alleged discrimination on February 18, 1994, and 1 (Dan Beardsley) receiving that treatment on April 11.

Of the 17 named for February 18, 14 are carpenters and named in the July 15, 1994 charge (GCX 1p) filed by Carpenters Local 140 in Case 12–CA–16381, and 3 are ironworkers (Grady Brown, Morris Dennison, and Sam Sullivan) and named in the July 15 charge (GCX 1r) filed by Iron Workers Local 397 in Case 12–CA–16382. Complaint 12(a) alleges that Zurn unlawfully refused to hire Sullivan on February 18. Beardsley, an ironworker, is the sole alleged discriminatee in the October 11 charge (GCX 1y) filed in Case 12–CA–16656 by the Boilermakers International Union. Finally, complaint paragraph 12(b) alleges that Zurn unlawfully refused to hire Lawrence Roberts on May 24. Roberts filed his own charge on July 27, 1994, in Case 12–CA–16418. (GCX 1t.)

To summarize, the alleged Bartow discriminatees are as follows, with the ironworkers listed as the last three for February 18. And recall that the names of Larry Jones and Grady Brown are italicized and marked with asterisks because they are salaried officials of their unions:

February 18, 1994

Damon Allen	Ronald Ballentine
Grady "Larry" Brown* (i/w)	Teddy Casey
Morris Dennison (i/w)	Dennis Franks
Sean Gaffney	James Gardner
Bobby Givens	Robert Hall
Dale Hunt	Carl Jones
Larry Jones*	Charles McCaul
John Palmer	Gary Smithers
Sam Sullivan (i/w)	

April 11, 1994

Dan Beardsley

May 24, 1994

Lawrence Roberts

b. February 18, 1994

(1) Carpenters

(a) Facts

Early efforts by the Carpenters (who did not identify themselves as union members) to seek employment at the Bartow jobsite met with instructions by the guard to apply at FJS. Indeed, a photo in evidence shows a rather large sign posted on the fence by the gate reading (GCX 91):

ZURN NEPCO

NOTICE

ALL EMPLOYMENT

APPLICATIONS MUST

BE PROCESSED BY

LAKELAND JOB SERVICES

309 N. INGRAM

LAKELAND, FL 33802

On Friday, February 18, Business Manager James Larry Jones of Carpenters Local 140 met 13 members of Local 140 at FJS. These are the 14 carpenters named above. (10:2152–2153.) Jones gave each a rather large "I'M PROUD TO BE UNION" button (GCX 64) to wear and advised each to write on his application that he was a volunteer union organizer. (10:2154, 2169.) When they entered the FJS office, Jones (Business Manager Jones, not Carl Jones) served as spokesperson for the group. (10:2154, 2179.) Jones told the female receptionist that they wanted to fill out Zurn applications for carpenter jobs. (10:2154, 2179.) The receptionist informed Jones that there was no job order for carpenters [journeymen], but that there was a Zurn order for carpenter helpers. (10:2155.)

Of the group of 14, only one, Damon Allen, was an apprentice; the others were journeymen, with most employed on other jobs. (10;2155, 2178.) Jones told her that Allen would complete an application for a helper's position. Allen did so. (8:1907–1909; 10:2155, 2179; GCX 87.) Although he has been a journeyman carpenter for many years, Ronald Ballentine also completed a Zurn application for a helper's position that was open at $12 per hour at Zurn. (9:2038–2040, 2058; 10:2155, 2180; GCXs 88, 89.)

Jones then had a conversation with Supervisor Yvonne Jordan in which he asked why they (the journeymen) were being denied applications. Jordan explained that the procedure required that FJS have a job order from an employer before posting it (on the computer, apparently) and that FJS would not take Zurn applications without the job call. (10:2157, 2182.) Jordan explained that veterans could fill out FJS applications, but not Zurn applications, and that veterans received priority treatment. [The priority treatment is at FJS. Zurn's hiring procedure does not have a priority hiring category for veterans (14:3264, Mace), although there is an emphasis at Zurn on hiring veterans. 8:1786, Brigham.] Jones and four other veterans (Barry Gardner, John Palmer, Gary Smithers, and one other whom Jones could not recall) filled out the generic applications and a veterans representative registered them on the computer. (10:2157–2160, 2182.) That was the last contact Jones or any of the other carpenters had with FJS regarding a job with Zurn.

Tom Brigham served as Zurn's personnel supervisor at the Bartow project from January 23 to April 11, 1994. (8:1780; 15:3274.) Brigham was followed by Walter Neal (15:3300) who began on April 11 and was still serving as of the trial.

[10] Unless otherwise stated, all dates for Bartow are 1994.

(6:1324; 16:3724.)[11] Neal's presence was interrupted by a 2-month medical leave from late August to late October 1994. During that medical leave, Malone substituted for Neal for some 4 to 5 weeks, and he apparently was followed by the timekeeper, Ann Bruner. (7:1574–1575; 16:3747, 3766; 17:3905–3906.) A credible witness, Brigham explains that competition was heavy for the Bartow jobs because the applicant pool of former Zurn employees was large, and included many coming off Zurn's Auburndale and other Florida jobs. (15:3282, 3308, 3429, 3451.) Walter Neal, a persuasive witness for Zurn, confirms that there was an overabundance of former Zurn employees seeking work on the Bartow project and that there were not enough positions to hire all the former Zurn employee-applicants. (6:1369, 1375.)

On his application (GCX 87), Damon Allen wrote that he was applying for a position as carpenter's helper 1. The 516 referral card shows that Allen was referred by FJS for the helper position. (GCX 87; 8:1913.) Brigham testified that he received the papers (15:3358), and that Allen was considered for a helper 1 and 2 position. He was not considered for a helper 3 position because of Zurn's policy of dropping no more than one level below the applicant's skill level. Allen was not hired, Brigham testified, because hiring commitments had been made. (15:3358–3359, 3485.) Thus, as Brigham testified (15:3361):

> Q. Do you know why applicant Allen was not hired for a Carpenter Helper 1 or Carpenter Helper 2 job at the Bartow jobsite?
>
> A. As I stated before [15:3308], the competition for those positions at Bartow was intense. He didn't have any priority. And the people that I did hire in those positions did have (come under one of our priorities, in our priority hiring policy). And I didn't have any slots for the man.

On his application, Allen wrote that he had been referred by the union's business agent, and that he was a "Volunteer Union Organizer." (GCX 87.) Brigham credibly testified that those entries played no part whatsoever in the decision process. (15:3366.)

Similarly, Ronald Ballentine was referred (GCX 88), but, Brigham testified, Ballentine was not considered because he did not complete the employment history section of the application other than his last employer, Milton J. Wood Company, at "Jax, Fla." where he was a carpenter from "Jan" to "1994." (GCX 88.) Ballentine also submitted to FJS a sheet bearing photocopies of eight documents (GCX 89), including his driver's license, his social security card, a receipt for payment of union dues, plus certificates for completion of various programs on health (passed a drug test), safety, and asbestos abatement. Ballentine testified that his service at Milton J. Wood was for 1 week in January 1994. (9:2065–2066.) He also testified that he did not take time to complete the previous employment section because he thought Zurn would call the union hall to obtain his experience record. (9:2049, 2067.) In addition to the copy of his union dues receipt from Carpenters Local 140, Ballentine wrote on the face of the application that he had been referred by the "union" and that he was a "Vol. Union Organizer."

Brigham received Ballentine's application (GCX 88), but not the extra sheet (GCX 89) containing photos of the various documents. Brigham did not consider Ballentine because he was an "unknown quantity" as he had not completed his application. (15:3362–3363.) Even if he had received the page of photocopies, Brigham testified, the documents would have disclosed practically nothing about Ballentine's skills or qualifications. (15:3363–3365.) Brigham credibly testified that Ballentine's entries pertaining to his union status played no part in the decision process. (15:3366–3367.)

Although Ballentine was referred for a helper's position, and that is what he applied for, he also wrote, for salary desired, "$15.00 plus Benefits Will neg." Brigham testified that the hourly pay rate for a carpenter helper 1 at Bartow was $13. (15:3360.) The FJS job order data sheet reflects that a pay rate of $12 for the job order. (GCX 138b at 112.) Ballentine could not recall ever working previously as a helper. (9:2052.) Asked if he would have accepted a job at Zurn for $12 per hour, Ballentine confessed, "No, I don't believe I—I don't believe I could at $12 an hour." (9:2077.)

Ballentine clearly was not a good-faith applicant for employment at Zurn for the helper position which, on the FJS computer, was open at $12 per hour, and for which he was referred. However, because the pay was actually $13 per hour, and because Ballentine was not asked about that rate, I shall not dismiss the complaint as to Ballentine on the ground that he was not a good-faith applicant for the helper 1 position.

During the 30-day period that the applications of Allen and Ballentine were active, Zurn hired four employees as carpenter helper 1 (RX 13 at 3–6), with three being hired on February 21 (Stephen Milcher, brass 114; Ronald Kula, brass 118; and James Tabor, brass 117) and one, Todd Miller, brass 141, hired on March 7. Each was hired at $13 per hour. (RX 13 at 4, 5; RXs 43–46.) All four, Brigham testified, were classified as priority preference hires (RX 13), with Milcher, Kula, and Tabor being employee-referrals by Eric Major and Todd Miller being a former Zurn employee. (15:3386–3392, 3445.)

Called as a witness by the General Counsel, Milcher testified that, as his application (RX 43) reflects, he had been working for Metric Construction Company. (11:2315.) Metric, Milcher testified, works nonunion, at least in the central Florida area. Brigham confirms that, so far as he knows, Metric operates nonunion. (15:3512.) Milcher had learned of Zurn's Bartow job from Eric Major at a previous Metric job. (11:2329–2330, 2344–2346.) Major, brass 92, was hired February 14 at Bartow as a cement finishing foreman (RX 13 at 3; 15:3338, 3356) and had previously been at Auburndale as a journeyman carpenter (RX 12 at 5, brass 87).

On February 17 Milcher telephoned the Bartow jobsite. Although Milcher does not recall whom he talked to (11:2316), Brigham recalls speaking with Milcher (15:3444). Milcher said he and two men who rode with him, Ronald Kula and James Tabor, were interested in work as carpenters. (11:2318, 2320; 15:3444.) Brigham said Zurn had no journeymen positions available, but did have some carpenter helpers available. Milcher expressed interest on learning that the pay was $13 and that it was possible to be moved up later. (11:2320, 2344; 15:3445.) Brigham told Milcher they had to go by FJS and fill out applications. (11:2320.) By the time the Milcher group arrived at FJS, however, FJS was closed. They called Brigham who told them to come by the next morning and pick up papers for a drug test. They did so, took the test (after a wait until

[11] Neal's hand entries begin at brass 150 on the Bartow brass log (RX 13 at 6) because in late March he spent a couple of weeks house hunting in the Bartow area. (16:3731). That no doubt explains why the FJS printout of job-order history shows the change in contact person from Brigham to Neal about that time. (GCX 138b at 123–126.)

nearly noon), again called Brigham who told them to proceed to FJS and fill out their applications. They did so, were referred, were hired, and reported to work on Monday, February 21.

Respecting the nine other carpenter applicants, the record reflects that none ever filled out a Zurn application and was referred by FJS to Zurn. Brigham confirms that to be the situation. (15:3367–3371.)

Over the course of the next 30 days from February 18, the record reflects that Zurn hired seven employees for the position of carpenter helper 2. (RX 13 at 4–6.) Five of the six were former Zurn employees, one (Martin Gonzalez, brass 131) was a name call, and the sixth, Chris Morris, brass 143, was eligible for the veterans special job training program under Department of Labor criteria. For this Zurn receives a tax credit and reimbursement of a portion of the wages paid. Thus, Morris was a Zurn priority hire category 7. (15:3393–3395, 3413.)

Turning now to the journeymen carpenters hired during that same 30-day period, the record discloses that Zurn hired five, with each being either a name call or a former Zurn employee. (RX 13 at 4–5; RXs 38–42.) No other carpenters were hired during the period. (15:3412–3413, Brigham.)

(b) Conclusions

It seems clear, and I find, that the General Counsel failed to establish a prima facie case of discrimination by Zurn against the carpenters. Moreover, Zurn established that all those hired came within Zurn's priority hiring categories. No discrimination having been shown, I shall dismiss complaint paragraphs 11(a) and 13(c) as to the 14 carpenters.

(2) Ironworkers

(a) Facts

Turn now to the three ironworkers—Grady "Larry" Brown, Morris Dennison, and Sam Sullivan. Brown and Sullivan testified, but Dennison did not. The president of Iron Workers Local 397, Brown is a full-time, salaried official of Local 397. (5:1153, 1162.) The morning of February 18, Brown and four other ironworkers, including Morris Dennison, went to FJS and asked the receptionist for applications for hire as ironworkers at Zurn. The receptionist told Brown that "they" [Zurn] had no current openings for ironworkers. (5:1156–1157.) An interviewer told Brown and the other four that only veterans could file applications [FJS], and that applicants would have to come in each day and check the computer. If a job were open on the computer, the interviewer told the group of five, then they could ask for applications if FJS was then accepting applications from nonveterans. Brown is not a veteran. (5:1157–1158.) Brown and the others were wearing union insignia. (5:1159.) Brown testified that he and the others have not returned to FJS because they did not think they would be given applications. (5:1168, 1171.)

Although he was not with the Brown group, Sam E. Sullivan also went to FJS the morning of February 18. A member of an Iron Workers local in North Carolina, Sullivan sometimes works out of Local 397 in Tampa. Because he is a veteran, Sullivan was able to confer with a veterans representative at FJS. Sullivan told him that he was a union ironworker looking for a job, that he had heard Zurn was hiring, and that he wanted to apply. The veterans representative informed Sullivan that there was no call by Zurn for ironworkers. (4:1025–1026, 1041, 1045.) The representative entered in the computer that Sullivan was qualified for ironworker, maintenance, and welding. (4:1042, 1045.) While at FJS, Sullivan filled out no papers. (4:1047.) Sullivan left, has not returned to FJS, and has not been called by FJS for referral to Zurn. (4:1030, 1046, 1049.) FJS recently called him for referral elsewhere, however. (4:1046.)

When shown the charge (GCX 1r) naming Brown, Dennison, and Sullivan, Brigham credibly testified that he never received a 516 referral for any of the three, which means none was referred by FJS to Zurn. (15:3369–3370.) As the record reflects, other than a few employees hired as rodbusters, reinforcing ironworkers, and ironworker helpers to do rebar work during the initial stage of the project (hired January to mid-February, RX 13 at 1–3; GCX 138b at 87, 98, 99, 108), no other orders were opened for ironworkers until April 4 when an order was placed with FJS (FL1015950) for one ironworker helper 1, at $12 per hour, with referral instructions to see "Walt Neil [Neal]." Steven Dyal is shown as being hired. (GCX 138b at 133.) The brass log discloses that Dyal, brass 153, was hired on April 11 as a structural ironworker helper 1 at $13.50. Dyal was a name call and a former Zurn employee. (RX 13 at 6; 16:3749–3750, 3789.)

(b) Conclusions

Aside from the Government's generalized attack on Zurn's hiring priorities as applied at Bartow, the General Counsel articulates no theory of discrimination by Zurn against the ironworkers. As for that, Zurn's priority hiring policy did not adversely affect the three ironworkers because Zurn was not hiring ironworkers when they went to FJS. Nor did Zurn hire any ironworkers over the next 30 days. In any event, finding that the prosecution has failed to establish, even remotely, a prima facie case of discrimination by Zurn, I shall dismiss complaint paragraphs 11(a) and 13(c) as to Grady "Larry" Brown, Morris Dennison, and Sam Sullivan. For the same reasons, I shall dismiss complaint paragraph 12(a), the allegation of refusal to hire Sam Sullivan.

c. April 11, 1994—Dan Beardsley

(1) Facts

Daniel Beardsley worked for Zurn as a structural welder on four construction projects, the last being at Cadillac, Michigan. (11:2256–2264, 2309–2310.) While Beardsley was at Cadillac, there was a strike by some employees over working conditions on the job, and Beardsley joined the strike about December 8, 1992. He picketed, a supervisor delivered Beardsley's last check to him at the picket line, and Beardsley (and other strikers) was videotaped by Zurn. (Apparently there were allegations in the Cadillac litigation of strike violence. There was no effort to relitigate that issue here, although there was some brief testimony here about it.) (8:1785; 11:2264–2269, 2294–2295, 2311.)

The record is unclear concerning whether Beardsley worked at Cadillac after the strike ended. In February 1993 Beardsley received a notice from Zurn that he had been laid off from the Cadillac job in a reduction of force. Beardsley was never informed that he had been accused of strike violence at Cadillac, and he testified that he did not participate in any there. (11:2294–2295, 2311–2313.) The personnel supervisor at Cadillac from about mid-November 1992 to about mid-April 1993 (8:1782), Brigham testified (8:1785) that Beardsley was eligible for consideration to be rehired at Bartow. Brigham was aware of Beardsley's participation in the strike at Cadillac.

(8:1785.) In about February–March 1993, Beardsley joined Iron Workers Local 340 of Battle Creek, Michigan. (11:2255, 2296.)

In January 1994, Beardsley began his efforts to be hired on Zurn's Bartow job as a structural welder. Consistent with his successful past practice of contacting the personnel supervisor (on his third job who contacted the Cadillac jobsite for him), or a general foreman for jobs two and three, Beardsley telephoned Bartow and spoke with Tom Brigham. There is no dispute that Beardsley told Brigham he had worked on the other Zurn jobs, that he was applying for a position as a structural welder, and that Brigham said that none was needed at the time because the job was still coming out of the ground. (8:1784–1785; 11:2272–2275, 2297–2298, 2310; 15:3416–3418.) Beardsley testified that Brigham said he would call Beardsley when Zurn needed structural welders. (11:2275.) Brigham credibly denies this, explaining that he told Beardsley that he had no idea when Zurn would be hiring structural welders and that Beardsley should keep in touch to check on the status of that craft. (15:3420.) Aside from Brigham's more persuasive demeanor, Beardsley's telephone records (he has some but not all) reflect many calls over the next few months, a fact which tends to corroborate Brigham's version that he told Beardsley to keep checking.

Although Beardsley recalls speaking to Brigham again when he called in February, and being told there was still no need for structural welders but that he would call when some were needed (11:2276, 2298), Brigham credibly testified that he spoke only once with Beardsley. (8:1784; 15:3417.) Beardsley's telephone records (he does not have those for January or February or for August) show calls to Bartow on March 11, March 28, and April 7 (possibly before Brigham left), and that the calls were 4, 1, and 1 minutes in duration. (GCX 93–94.) Beardsley claims that, if he did not get through the first time he called, he would call again until he did, or if the personnel supervisor was not in, Beardsley would call another day. (11:2298–2299.) As we see later, Walter Neal acknowledges speaking at least three times with Beardsley, with two of those times, however, coming after the relevant events. Although it actually is an immaterial issue, I find that Beardsley spoke with Brigham only once.

According to Beardsley, as Brigham said they later would be hiring structural welders, he asked if he could submit an application now, and "they" said he could. Beardsley identified the generic "they" as being Brigham. (11:2292.) Brigham told Beardsley that he had to go through Job Service, and so Beardsley went to the New York State Job Service and sent an application with a resume. (11:2293.) Brigham credibly testified, however, that, at the time of the call, he had already received the generic Job Service application from New York. Brigham told Beardsley that he had to register at the local FJS, and that Zurn did not accept unsolicited applications or applications from out-of-state Job Service offices. (15:3417–3420.)

Because Brigham was concerned that the New York State Job Service application reflected a "glitch" in the agreement with FJS that FJS would register and process and screen applications locally, Brigham took Beardsley's New York application to FJS and gave it to, apparently, Supervisor Yvonne Jordan, who said she would tell New York that the application would be handled by FJS. (8:1880–1881; 15:3420–3421, 3497–3498.)

Brigham testified that no structural welders were hired at Bartow until after he left the job about April 11. That is so, Brigham testified, because the stage for erection (above ground) of structural iron had not been reached. Brigham understands that structural welders were not needed until that summer. (15:3421–3422, 3499.) The record reflects that the first structural welder was not hired at Bartow until July 25 when Douglas Sargent, brass 208, was hired. He was a name call and a former Zurn employee. (RX 13 at 9; RX 102; 16:3745.)

Beardsley testified that he spoke, by telephone from New York, with Walter Neal more than 10 times between February (11:2277) [Neal had not yet arrived in Bartow] and sometime in August (11:2276, 2290, 2299–2300). Neal acknowledges speaking with Beardsley 3 times, and possibly as many as 5 times, but denies that it was as many as 10 times. Neal recalls only three calls, the first being shortly after he arrived at Bartow, the second around Thanksgiving 1994, and the third being in January 1995. (16:3740–3741.) Both agree that Beardsley listed his former jobs for Zurn and that he was looking for work as a structural welder at Bartow. (11:2276–2277; 16:3739, 3741, 3763.)

Beardsley does not claim that he told Neal, or anyone, of his picketing at Cadillac, and Neal credibly testified that Beardsley did not do so and that Neal was not aware of it. (16:3750.) Moreover, Neal (16:3755–3756) and Brigham (15:3420) credibly testified that they never discussed Beardsley. Although Beardsley claims that Neal, beginning in February (11:2277), said that he would call Neal when Zurn needed structural welders, Neal (16:3742) credibly denied doing so. Beardsley's July telephone statement (GCX 97) reflects a 1-minute call to Bartow on July 22. That would not appear to involve a conversation with anyone other than a receptionist. Most of the calls shown are in the 1–3-minute category, with one 5-minute call on May 9 (GCX 95 at 2) and one call, the longest, of 14 minutes on May 23. (GCX 95 at 4.) A call of 14 minutes could have been a conversation with Neal, or it could mean that Beardsley was on "hold" for some reason. In any event, I credit Neal's testimony that it had been so long since he had talked with Beardsley that he did not even think of him or anyone else when Sargent, a local person, was hired on July 25. Sargent was the only structural welder hired while Neal was working at Bartow. (16:3742–3743.) As I already have observed, Sargent was a name call. (RX 13 at 12; RX 102; 16:3745.)

According to Beardsley, he was calling from a pay telephone when he made his last call, in August, to Bartow, and spoke with Neal. (11:2290, 2299–2300.) In any event, Beardsley has lost or misplaced his August telephone statement and had not yet obtained a copy from the telephone company as of his February 28, 1995 testimony. (11:2280.) According to Beardsley, when he spoke to Neal in August, Neal said the job was just about completed and that Zurn did not need any structural welders. (11:2290.) Beardsley apparently did not ask how that could be in the face of Neal's earlier statements that there was yet no need and that Neal would call him when some were needed. Beardsley testified that he never received a call from either Brigham or Neal. (11:2290.) Although Neal does not expressly deny telling Beardsley in August that the job was about over and that no structural welders were needed, such a denial is implicit in Neal's description of his conversations. I credit that implicit denial.

Moreover, I do not believe Beardsley in his testimony that he spoke to Neal in August. First, Beardsley has no copy of his late August telephone record, when it seems that he would have

a copy of that record along with the others. Although he claims to have placed that call from a pay phone, unless he put cash into the pay phone, the call would show up on his record. Second, the job was not about over, and it is highly unlikely that Neal would have said such knowing, as he must have, that more structural welders would be hired in a few weeks. Finally, as Beardsley apparently was by then a member of Iron Workers 340, he easily could have had union sources verify for him the status of the Bartow job and whether Neal was truthful in telling him that the job was about complete. In short, I find that no such conversation occurred.

Recall that Neal was off work for surgery from late August to about October 24. (16:3747.) Between September 19 and October 4, while Neal was out, Zurn hired five structural welders: Robert Doster, brass 267; Kevin Pelfrey, brass 273; James Payne, brass 286; Walter Gilbert, brass 289; and Scotty K. Miller, brass 294. All but James Payne were both name calls and former Zurn employees; Payne was neither. (RX 13 at 12–13.) As Payne was hired September 27 (RX 13 at 13), he apparently was hired while B.J. Malone was substituting for Neal. Other than what appears on the Bartow brass log (RX 13 at 13), there is no other evidence in the record about James Payne. Beardsley makes no claim that he ever spoke with Malone or Ann Bruner. Neal (16:3756) credibly denies ever having a conversation with B.J. Malone about Beardsley, and Malone (17:3902–3903) confirms this, adding that he does not know any Beardsley, has never spoken with anyone claiming to have picketed at Cadillac, and that he has never spoken with Brigham about Beardsley. Ann Bruner did not testify.

(2) Conclusions

Aside from the Government's generalized theory of a violation by the application at Bartow of Zurn's priority hiring policy, the discrimination theory which the prosecution appears [it is not articulated] to present here is that knowledge of Beardsley's picketing activities at Cadillac is shown, personally as to Brigham and corporate through the videotaping; that contrary to Beardsley's past successes at being rehired by calling the personnel supervisor or a general foreman, this time he was unsuccessful; and that Zurn hired four (Br. at 15; a miscount of the five) structural welders after January 1994.

As for knowledge, only Brigham knew of Beardsley's picketing activities at Cadillac. Even if there is corporate knowledge via the videotaping, neither Neal nor Malone was aware of Beardsley's picketing activities at Cadillac. As for Beardsley's past successes, it appears that jobs were available when he contacted the personnel officer and general foremen. That was not the case at Bartow. I have found that the phantom August conversation (in which Neal supposedly lied and said that the Bartow job was nearly complete) never occurred. Respecting the five structural welders hired, all were hired months after Brigham had left Bartow. Finally (and not even mentioned in the prosecution's brief), Zurn's September 27 hiring of James Payne (not a priority hire) presents the only conceivable basis for the prosecution to argue that Zurn should have called Beardsley rather than hiring someone (James Payne) "off the street." But who would have called? Not Brigham, for he was long gone. Not Neal, for he was on medical leave. And corporate knowledge did not attach to Malone because he credibly testified that he knew nothing about Beardsley.

Finding no prima facie case of discrimination by Zurn against Beardsley, I shall dismiss complaint paragraphs 11(a) and 13(c) as to Dan Beardsley. The Beardsley allegation completes the coverage of all names in paragraph 11(a), and as I have found no merit to any of the allegations, I now dismiss complaint paragraph 11(a) in its entirety.

d. May 24, 1994—Lawrence Roberts

(1) Facts

An experienced union pipefitter, Lawrence Roberts has been registered with FJS since about January 1991 as a military veteran. At that time, the veterans representative entered, in the computer, Roberts' data, including the different local unions which have referred him to jobs. In short, the FJS computer shows that Roberts is a union member. (10:2095, 2106–2107.) At some point in the summer of 1993, Roberts went to Zurn's Auburndale jobsite to apply for work. Telling Roberts that applications were not taken at the project, the security guard at the gate directed Roberts to apply at the Lakeland office of FJS. (10:2095, 2107–2108.) Roberts filled out a card at FJS, but nothing ever came from that. Moreover, he took a job about the same time with Brown and Root. (10:2096–2097.)

As earlier mentioned, Gerald Jaisarie works part-time at the Plant City office of FJS under a "work/study" program with the Veterans Administration, and he assists the veterans representative. (4:773–774.) The balance of the day, Jaisarie attends school. (4:797–798.) As a "work study," Jaisarie makes job searches on the computer. Once he finds a job opening, he then searches for a veteran with matching qualifications. He then calls the veteran. (4:779–780.) Jaisarie deals only with the veteran, and not with the employer. (4:800, 809.) With the job opening at Zurn for a pipefitter, Jaisarie thought of Roberts and decided to call him because he met the qualifications. (4:800, 810.) Indeed, about 3 or 4 days earlier Roberts had been in the Plant City office and Jaisarie had done an extensive search for Roberts, but had found nothing which interested Jaisarie. (4:808–811.) There is no dispute that in May (Roberts specifies May 23) Jaisarie called Roberts about a job opening for a pipefitter at Zurn's Bartow project. (4:791–792, 807–808, 810; 10:2099, 2107.)

There is no material difference between the versions of Roberts and Jaisarie concerning their May 23 telephone conversation. After Jaisarie described the $14.75-per-hour job opening at Bartow, and asked whether Roberts would be interested, Roberts said yes. Jaisarie told him he would need to register at the FJS' Lakeland office. Roberts said fine. Roberts asked if Jaisarie was certain the job was available for him. Jaisarie said yes. Roberts said he did not believe Zurn would hire him. When Jaisarie stated that Roberts was a pipefitter, Roberts said he was but that he did not think Zurn would hire him because he was union. After a pause, Jaisarie said he was sorry for bothering him, and that if something else came up, they would give him a call. That ended the conversation. (4:808, 811–812; 10:2099–2100, 2108.)

Roberts testified that he asked Jaisarie if he was sure the job was available for him because it is general knowledge among organized labor that Zurn does not knowingly hire union members. (10:2100.) The following morning, concerned that FJS might construe his response as a job rejection, with a resulting termination of the unemployment benefits he then was receiving, Roberts went to the Lakeland office of FJS. (10:2101, 2109–2110, 2112–2113.) A representative there told him there was no job available. (10:2102, 2113.) Roberts then went to the FJS' Plant City office, and a veterans representative there informed Roberts that two jobs had been available but they had

been filled. Roberts accused FJS of screening applicants (screening out union applicants, apparently). "He denied it, and I left." (10:2102, 2114.)

Walter Neal testified that he does not know Lawrence Roberts, has had no conversation with him, and no conversation with anyone at FJS regarding Roberts. (16:3758.)

The Bartow brass log shows no pipefitter hires from May 18 through 30. (RX 13 at 7.) On May 31 Charles Martin, brass 171, was hired as a pipe welder at $15 per hour, and Paul Hurni, brass 172, was hired the same date as a pipefitter at $15 per hour. Both are listed as name calls and former Zurn employees. (RX 13 at 7.) Both had worked at Auburndale. (CPX 12s at 96–97, 134; RX 73; 17:3832, 3840–3844.)

Douglas Wade Atkins, brass 175, was hired on June 6 as a pipefitter at $15 per hour. Atkins was a name call and a former Zurn employee. (RX 13 at 7.) Atkins also had worked at Auburndale. (RX 12 at 22, brass 265.) It was July 11 before the next journeyman pipefitters were hired (two, both name calls and former employees; RX 13 at 8, brass 185 and 186). Additional pipefitters and pipe welders were hired thereafter. The FJS job-order printout assists in showing the timing here, for the hire date is not necessarily the interview date. Thus, Hurni was entered on FJS' computer on May 18 under job order FL1043626, an order for one pipefitter. The result is shown as a hire. (GCX 138b at 145.) Job order FL1044912, dated May 20, called for two pipefitters, with Charles Martin (hired as a pipe welder) and Douglas Atkins hired out of six referrals. Martin's name was entered on the FJS computer on May 23, and that of Atkins on June 1.

The computer notes, which are obscure and need interpretation (not provided by testimony) in some respects, indicate that Zurn called the morning of May 23 needing one pipefitter immediately. The notes about Atkins are confusing, seemingly suggesting that he was interviewed, hired, and began working on May 23, but notes for June 1 and 7 state that he will, and did, begin work on Monday, June 6. (GCX 138b at 146.) The record compiled from the Zurn job applications reflects that the date of Atkins' application was June 1. (CPX 12s at 6.)

The point, as I find, is that a FJS representative checking the computer on May 24 apparently had some basis for telling Roberts that the two openings had been filled. Whether that was clear to the representative from the computer cannot be determined from the record here. Moreover, the existence of the separate order, for which Hurni was hired, complicates the picture. Thus, it is not known whether the FJS representatives on May 24 were looking at one or two job orders.

Return now to the testimony of Roberts and Jaisarie. To Roberts, Jaisarie's "I'm sorry to have bothered you" indicated that FJS was no longer interested in him because of his union affiliation (10:2110), and, in Roberts' view, there is no way FJS could have interpreted his response as a rejection of the job because it was not that. (10:2112.) According to Roberts, he wanted the job because it pays more than unemployment. (10:2110, 2113.) Although, I find, Roberts testified sincerely, I also find that Jaisarie added an additional statement, that if anything else comes up, they would be sure to give him a call. (4:808, 811–812.)

Turn now to the rather sarcastic remark Roberts made, that he did not think that Zurn would hire him because he was union. First of all, Jaisarie knew that Roberts was union because Jaisarie had inspected Roberts' work history on the computer (4:778), plus having worked in person with him just 3 to 4 days earlier, and (10:2095, 2106–2107) that work history included the various union locals which had referred Roberts. The obvious question one has is why did not Jaisarie simply respond to Roberts, "Mr. Roberts, the job is open. Do you want to apply or don't you?"

But that would be asking too much of student Jaisarie, who appeared to me to be about 27, and (4:773, 812) who had just started working at FJS about 3 months earlier. Roberts' sarcastic response shocked Jaisarie: "I didn't know what to say at the time because I never had somebody say that to me. What I'm trying to say is that I'm calling him on a job and we don't discriminate, you know. If he's union or nonunion, we—it doesn't matter to me." (4:808.) So, "What could I say. The only thing I said to him was that if there's something else that comes up, we'll be sure to give him a call." (4:808.) And, "And my response—I—I'm not familiar with the union system and how it works, so I couldn't say anything to him." (4:811.) Jaisarie simply went on to the next veteran. (4:812.)

Jaisarie credibly testified that he never has had any contact with a representative of Zurn (4:809) (aside from being interviewed by a Zurn attorney about 2 weeks before testifying, 4:793), and that no one at FJS ever told him that Zurn preferred nonunion applicants over applicants who are union members. (4:809.)

(2) Conclusions

I have no doubt that Lawrence Roberts is sincere in his belief that Gerald Jaisarie's response indicated that Roberts would not be considered for the Zurn job because of his union affiliation. Similarly, it is clear, and I find, that the reply of the youthful (appearing to be about half the age of Roberts) and inexperienced Jaisarie was so expressed, and the call terminated, because Jaisarie was in shock from Roberts' perceived rudeness. Not knowing how to deal with such acerbity, Jaisarie politely ended the conversation and went on to help the next veteran. Jaisarie terminated the call, I find, not because of Roberts' union affiliation, but because of Roberts' rudeness. If Jaisarie never undertook to call Roberts again, for a job opening at Zurn or any other company, it is not because of any union considerations, but because Jaisarie did not want to talk with someone who came across to him as unpleasant and discourteous.

Of course, Roberts' response would not even have ruffled the feathers of a seasoned representative who, as I have indicated, might have come back with something on the order of, "Look, buddy. The job is open. Do you want to apply or not?"

In any event, Zurn knew nothing about Lawrence Roberts (who never filled out a Zurn application and was never referred to Zurn). As the evidence falls far short of establishing a prima facie case of discrimination by Zurn against Lawrence Roberts, I shall dismiss complaint paragraphs 12(b) and, as to Lawrence Roberts, paragraph 13(c).

4. Mulberry[12]

a. Introduction

Recall that, aside from the general charge expressed in complaint paragraph 13(c), the discrimination allegations applying to Mulberry are that Zurn refused to hire Camilo Juncal (par. 12c) and James A. Bragan (par. 12d) about October 11, 1994, and Glen Thornbury (par. 12e; GCX 153; 16:3606) about November 2, 1994. As summarized earlier, Juncal and Bragan are

[12] Unless otherwise stated, all dates for Mulberry are for 1994.

salaried staff organizers for the Boilermakers. Thornbury is a member of Pipe Fitters Local 624. (16:3648.) And recall that earlier I dismissed complaint paragraph 10, an allegation that, about October 10, B.J. Malone "impliedly threatened" not to hire applicants because of their union affiliation (the "keeping tabs" remark).

As we are about to see, the October 1994 efforts by Juncal and Bragan to be hired at Zurn's Mulberry project were generated by a call to Juncal from Veterans Representative Anderson at FJS about a job opening at Zurn. Thornbury, who has been referred to many employers by FJS' representative Bob Hill, telephoned Hill in September. Hill suggested that Thornbury come to FJS and apply for 1 of 15 pipefitter openings at Zurn. (16:3649–3651, 3665.)

Because of the large pool of priority applicants available for positions at Auburndale and Bartow, jobs there were hard to come by for nonpriority applicants (and there were not even enough positions to hire all the priority applicants). If the situation at those two projects was difficult for nonpriority applicants (and the unsuccessful priority applicants), it must have been even more frustrating at Mulberry because of the unusual circumstances there. Ordinarily, Zurn begins the construction of a project which it contracts to build. That was not so at Mulberry where, after construction already was in progress by Plant Process Equipment Company (PPE), Zurn was substituted as the construction and engineering contractor on very short notice. For Zurn, the situation was "unique" and "never encountered before." (14:3128, 3221, Mace.) It was a "first time" for Zurn. (8:1728, Malone.)

PPE had about 160 employees working on the Mulberry project. (14:3128.) Because of the need to staff the job quickly, because of public relations considerations, and to keep from turning all 160 PPE employees onto the street, Zurn decided to accord all qualified PPE employees preferential hiring status as priority category 3. (14:3128–3129, 3219.) Although no revision issued to Zurn's policy 303 respecting this situation (14:3205), Zurn's President Butynski did approve the oral modification which gave PPE employees the category 3 status (14:3220, Mace.)[13] As Malone credibly testified, Mace simply told Malone to accord qualified PPE employees category 3 status. (8:1728, 1738; 17:3883–3884, 3916.)

Actually, it is not entirely clear whether PPE employees were given sole possession of category 3, or whether they shared it with qualified individuals "recommended by a current Company supervisor or manager." The former is implied from the record, with the result being that, only for Mulberry, policy 303's eight numbered priority categories were increased to nine, as those below one and two were moved down to make room for the new third category—PPE employees who were working on the Mulberry project immediately before Zurn replaced PPE as the contractor. Apparently fewer than a third of PPE's 160 employees were hired by Zurn. In Zurn's view, the Mulberry job, under PPE, was overstaffed in some crafts. (14:3129–3130.)

Finally, Mace testified that the agreement was signed on a Wednesday in early October (14:3128–3129.) Zurn's short notice impacted on the personnel function. Malone, the personnel supervisor for Mulberry from the beginning (7:1484–1485; 17:3805), credibly testified that Mulberry also was not typical respecting the time he had for preparation. Ordinarily, Malone testified, he enjoys a lead time of 4 to 6 weeks to prepare for hiring on a jobsite. At Mulberry, however, Malone received notice late Thursday afternoon to begin hiring the next day, Friday, October 7. (17:3884–3885, 3902; RX 14 at 1.)

As the Mulberry brass log reflects, by the end of the first full week (Friday, October 15), Malone processed the hiring of 102 employees. (RX 14 at 1–6, brass 26 through brass 127.) After 3 weeks and 2 days (counting October 6 when the first three carpenters were hired), through October 31, Malone had supervised the hiring of 180 employees. (RX 14 at 1–10, brass 26 through brass 205.) (Brasses 1 through 25 employees are not listed because the first several brasses are reserved for salaried staff.) Many of these first hired were former PPE employees (CPX 12s), as the testimony of Government witnesses Billy Landry and Douglas Jarman confirm.

Billy Landry, the piping general foreman at Mulberry (13:2663), testified that "a lot of" PPE employees were hired. (13:2696.) Moreover, during a recall following a layoff, Landry testified, the supervisors recommended recalling employees who had already worked for Zurn at Mulberry (13:2755):

> A. Yes. And some of the ones that we already knew were good people, you know, to bring back to have them do us a good job. Because we were in the mode where you had to—It was a rush job. You know, you had to get things done. So we tried to call and get the best ones that didn't mind working and get them back.

Pipefitter Foreman Douglas Ray Jarman testified that he and at least 95 percent of his 20-man crew were brought over from PPE. (13:2854, 2866.) Jarman verifies that when Zurn first took over at Mulberry there was a rush to get the work done, that Zurn needed skilled employees, and that they worked 80 hours a week in order to meet the completion schedule. (13:2933.) There was, Malone credibly tells us, no time to train anyone. (7:1558.) In his deposition, Richard Patrick, who had been the piping superintendent, testified that notice was very short and that the pace was the fastest of any job he has ever worked. (GCX 148 at 20, 38–39.) As Malone bluntly puts it, Mulberry "was no training program." (17:3890.)

b. Juncal and Bragan referred by FJS, but not hired

There is no dispute that, pursuant to a call from FJS, Camilo Juncal and James A. Bragan went to FJS and applied for open positions at Zurn. On October 7 Juncal applied, and was referred, for the open positions of pipe welder (GCX 52; Job Order FL 1123631) and ironworker (GCX 52; RX 62; Job Order FL 1123482). (2:367–370, 375–378; 17:3885–3889.) On October 10 Bragan applied, and was referred on Job Order FL 1123631, for the open position of pipe welder. (GCXs 57, 58; RX 63; 3:663–664; 17:3885, 3889.) It also is undisputed that Zurn did not offer employment to either Juncal or to Bragan even though Zurn hired many others.

Personnel Supervisor B.J. Malone credibly testified that Bragan and Juncal were not hired because they had no (Juncal) or inadequate (Bragan) recent experience. As Malone testified (8:1727, 1755; 17:3889–3990), and as Bragan's application reveals (RX 63 at 3), Bragan had worked with the tools of the trade for less than 3 months (late May to mid-August 1994) during the previous 5 years. As Juncal's application (GCX 52; RX 62) reflects and as he concedes (3:531), Juncal has not worked at the trade since becoming an organizer for the Union

[13] Union counsel inadvertently states (Br. at 55) that Butynski did *not* give permission.

in November 1991. As Malone credibly testified, "You know, we want people in our business who have worked on their tools the last three or four years." (7:1557.) Additionally, Malone testified, all the open slots were filled by priority hires, including Plant Process Equipment Company employees. (8:1727–1728.)

The FJS printout (GCX 138b at 210–211) reflects that, for Job Order FL 1123631 (journeyman pipe welder), a total of 41 applicants, including Bragan and Juncal, were referred, with 28 being hired and 13, including Bragan and Juncal, not hired. Of interest is the fact that Dencil Truman, one of those not hired, is a former Zurn employee, having worked at both Auburndale and Bartow. (CPX 12s at 218.)

Neither the prosecution nor the Union points to any evidence showing that any of the ones hired were less qualified than Bragan or Juncal. The prosecution contents itself with citing the brass log (RX 14) and arguing (Br. at 10) that "Neither Bragan nor Juncal were [was] ever hired by Zurn while literally dozens of people were hired as ironworkers, pipefitters and pipewelders from October 10, 1994 through the present. R. Exh. 14, p. 2–14." The Government's position is nothing more than an argument that it makes out a prima facie case of discrimination by showing that known union members were not hired while other applicants (union or nonunion preference unknown) were hired, with the burden then shifting to Zurn to prove its innocence. Such is not the law, and its argument is no substitute for proof of discrimination on this referral (much less is it proof of discrimination as to all other referrals on the job, a job that was not even complete when the hearing closed). Consider now the FJS printout for the ironworker job order, FL 1123482 (GCX 138b at 204). It shows that, of 17 referred, 11 were hired, and 6 (including Juncal) were not hired. Again, neither the General Counsel nor the Union points to any evidence showing that any of those hired were less qualified (specifically, that they had not worked with the tools of the trade for several years) than Juncal.

I find no merit to this allegation because the General Counsel has failed to establish a prima facie case that Zurn, because of union animus, rejected the applications of James A. Bragan and Camilo Juncal. In so finding, I have considered the fact that Bragan and Juncal had conversations with Malone at the gate during this time as they were seeking to alert Malone to the fact of their applications. At one point, as I described earlier, Malone remarked that he and Bragan kept "tabs" on each other. I have dismissed the 8(a)(1) allegation respecting the "tabs" remark, and I find here that it does not show animus. Malone also stated during the conversations that he was aware Bragan had been seeking employment with Zurn for several years. I find no animus reflected in that statement. Accordingly, I shall dismiss complaint paragraph 12(d).

c. Glen Thornbury referred by FJS, but not hired

Most of the material facts regarding Glen Thornbury are undisputed. His initial application (GCX 146, October 20), shows, for his employment history, Pipe Fitters Local 624 and that he is a "union organizer." (16:3666, Thornbury.) At trial, Thornbury explained that he has attended classes for training of organizers, and that his purpose in applying at Zurn was to organize. (16:3667, 3672.) FJS Representative Bob Hill called Thornbury and told him that Zurn would not accept the application and that he needed to complete a new one and that Zurn was hiring pipefitters, Hill gave Thornbury Malone's telephone number. After completing a second application (GCX 145), October 31), on which he included "welder" among his other work skills (plus "trained union organizer"), Thornbury telephoned Malone and alerted him that the new application was at FJS.

Thereafter, in a second telephone conversation (Malone recalls only two conversations, although Thornbury asserts they had more than two), Malone offered Thornbury a job as a pipe welder. Thornbury said he could not do that work because of poor eyesight. (16:3658, 3675.) By date of November 30, Malone wrote Thornbury a letter reading (GCX 147):

> This letter is to follow up on our telephone conversation of November 1, 1994 during which I offered you a job as a pipe welder at the Mulberry Ethanol Plant on State Route 555 in Bartow, Florida. I appreciate your candor in telling me that you could not accept the offer because your eyes were in bad shape and you were having difficulty seeing well enough to weld.
>
> Best of luck to you.

Thornbury testified that, rather than the November 1 date specified in the letter, the telephone conversation was some 10 to 14 days later. (16:3661, 3673.)

At trial Thornbury testified that his eyesight does not prevent him from being a pipefitter, and that in several conversations with Malone after the job offer Thornbury asked about pipefitting work, and that Malone never asked whether Thornbury's eyesight was good enough for pipefitting. (16:3680.) However, Thornbury admits (16:3675) he never told Malone that his eyesight was sufficiently good for him to do pipefitting.

Malone credibly testified that, even though the FJS 516 card referred Thornbury for a pipefitter's position, at the time Zurn had plenty of fitters and Malone needed welder to match with all the fitters he had. Malone therefore checked Thornbury's skills, saw that he could weld, and offered him a welder's job. Thornbury never said his eyesight was good enough for pipefitting. Malone never offered Thornbury a pipefitter's job thereafter because Malone viewed Thornbury's poor eyesight as being as much of a problem with fitting as with welding. (17:3897–3899, 3917–3918.)

The General Counsel offered in evidence an April 14, 1995 position letter (GCX 151) which Zurn's counsel submitted respecting the charge as to Thornbury. The Government does not articulate in what way the letter is different from Malone's testimonial position, but to the extent the letter differs somehow, I find that the letter is not inconsistent with Malone's testimony.

Documents of record support Malone's testimony. Thus, the FJS computer printout reflects that, after the pipefitter job order on which Thornbury was referred (GCX 138b at 235–236), from which 35 referrals reportedly were hired, there were 5 calls for pipe welders up to the printout's closing date of December 6, 1994. (GCX 138b at 237, 240, 254, 267, and 270.) The Mulberry brass log discloses that Zurn hired 15 pipe welders in November, with the first being hired on November 5 (brass 227) and the last being hired on November 18 (brass 262). To the extent that it matters, I find that the telephone conversation, in which Malone offered the pipe welding job to Thornbury, occurred at some point during the first week of November 1994. While Thornbury's later estimate is not implausible, the first week in November is more consistent with the date of Thornbury's second application, the hiring need for

pipe welders, and Malone's statement in his letter of November 30.

Finding that the General Counsel has failed to prove that Zurn's failure to hire Thornbury constitutes a prima facie violation of the Act, I shall dismiss complaint paragraph 12(e). To the extent that complaint paragraph 13(c) applies to Thornbury, I dismiss that allegation as to him.

J. Findings Respecting Appendixes

1. Union Appendix A

Based on four appendixes (lists of names extracted from the records) to its brief, the Union presents certain statistically based arguments. These contentions are effectively answered in Zurn's reply brief.

First, Appendix A (and Union's Br. at 48) contends that Zurn hired 222 employees (Union's count; the list of names is unnumbered) on the three Florida jobsites who were not referred by FJS. The list of 222 names was compiled by comparing the names on the FJS computer printout (GCX 138b) with the names on the list (CPX 12s) compiled from the applications of those actually hired. (In other words, 222 names appear on CPX 12s that do not appear on GCX 138b.) Consequently, the Union argues, Zurn's supposed rule requiring registration at and referral by FJS is nugatory and the Union's letters of August 25 (GCX 39) and October 13, 1993 (GCX 44), should be considered sufficient application for consideration for employment at Zurn.

This contention is without merit because the FJS computer printout (GCX 138b), as I wrote earlier, is unreliable except when consistent with Zurn documents, such as the brass logs. First, the printout ends, as it states, on December 6, 1994. Thus, those hired at Bartow and Mulberry after that date do not appear on the printout, yet appear on Charging Party's Exhibit 12s. For example, James C. Beaver is listed among the 222 (as the sixth name), yet Charging Party's Exhibit 12s shows that he did not even apply until December 12, 1994—6 days after the cutoff date of General Counsel's Exhibit 138b. (As both CPX 12s and RX 13 at 16, brass 350 (the Bartow brass log) show, Beaver was hired on December 14. Actually, and contrary to the Union's list of 222, Beaver is listed on GCX 138b at page 271 for November 21. The raw data does not explain what happened.) Similarly, Lawrence Clincy (16 on the list of 222) is shown, yet he was not hired until December 13 (RX 13 at 16, brass 349). Once again, the Union's contention is in error because Clincy is listed on General Counsel's Exhibit 138b at 277 (the last page) as having an appointment date of December 5, 1994—the day before the printout's cutoff date of December 6. Charging Party's Exhibit 12s at 37 shows that Clincy's application is dated December 5.

Howard Haas is listed as one of the 222 as not being referred by FJS for his job at Bartow. If that is true, the mistake benefited an openly declared union organizer. (Recall the discussion, in the conclusions section for the topic of August 1993 and the 19 boilermakers, that Haas was given a priority preference at Bartow after giving written notice (RX 90) to Zurn of his intention to organize at Auburndale.)

Kevin Pritchard is listed as one of the Union's 222, and is shown on Charging Party's Exhibit 12s as hired on December 7, 1994 (the correct date is December 8, RX 13 at 16, brass 340). In fact, Pritchard is listed on General Counsel's Exhibit 138b at 274 for December 5, so he was referred through FJS.

Other names could be cited of employees, listed among the Union's 222, who were hired from mid-December 1994 into January (Bartow brass log) and February (Mulberry brass log) 1995. As it is certainly probable that they applied after the printout's cutoff date of December 6, it is not at all surprising that their names do not appear on General Counsel's Exhibit 138b. For example, Ellis Johnson is listed as being hired at Mulberry, yet not shown on General Counsel's Exhibit 138b. But even Charging Party's Exhibit 12s, at 103 (the page the Union itself cites), shows that Johnson did not apply for the Mulberry job until February 3, 1995, 3 days before he was hired. There is no reason Johnson's name should appear on GCX 138b, the cutoff date of which was nearly 2 months earlier.

The foregoing errors in the Union's contention, and in its own list of 222, simply highlight a major objection which Zurn registered at the trial in urging that GCX 138b not be received in evidence. That is, GCX 138b had no sponsoring witness (other than by affidavit, GCX 139), and Zurn was left with no opportunity to cross-examine respecting the compilation of the data or even to voir dire respecting foundation. (14:3041.) As counsel perceptively observed (14:3042), "It's going to be mass confusion and it's going to show up in the briefing on that point."

Nevertheless, over Zurn's several objections, and with "some reluctance and some real hesitancy," I received General Counsel's Exhibit 138b, accepting the General Counsel's argument that the objections went to weight rather than to admissibility. (14:3063, 3068.) This litigation by lists of names in the briefing process is a poor substitute for testimony from a sponsoring witness who is subject to cross-examination. Shifting the trial from the witness stage to the briefing stage guarantees confusion, questions, and doubt over the integrity and significance of raw computer generated data. The lack of a sponsoring witness to explain General Counsel's Exhibit 138b produces an acute problem when we realize that FJS headquarters at Tallahassee purges the FJS computer every year. (18:4072, Jordan; 18:4183–4184, Franceschi.) However, we are not sure when this occurs (Franceschi thinks it occurs in July), nor do we know to what extent the purge takes. As General Counsel's Exhibit 138b pulled up some files more than a year old, it seems clear that not every closed job order is deleted during the purge. Speculation is the order of the day.

Citing the purge problem, and countering the Union's list with its own appendix (Reply Br. at 4–5, and Appendix J), Zurn lists 142 numbered names of employees hired at Auburndale, during the period covered by General Counsel's Exhibit 138b (January 1, 1993, to December 6, 1994), but over a year before General Counsel's Exhibit 138b was generated on December 6, 1994, who are not listed on General Counsel's Exhibit 138b. The explanation proffered by Zurn is that the 142 names were deleted when FJS headquarters purged the computer at some point and to some unknown extent. At least some, perhaps many, of the 142 names appear on the Union's list of 222. Examples include the first three Auburndale employees on the Union's list: Mark Anderson (brass 112, RX 12 at 7); Jeff Andrews (brass 193, RX 12 at 16); and Daniel Baker (brass 196, RX 12 at 17).

Of several inferences that can be drawn, one that is at least as strong as any other is that General Counsel's Exhibit 138b is incomplete because names were deleted as part of FJS' annual

purging. Thus, I find, General Counsel's Exhibit 138b is not incomplete because Zurn hires were not referred by FJS.

Finally, as Zurn observes (Reply Br. at 5–6), it is important to note that not a single witness testified that he was hired by Zurn without first registering at FJS. With the exception of James Bragan (who sought to submit an application, GCXs 55, 56, using a blank Zurn application which he had obtained elsewhere, 3:744), no witness testified that he received a Zurn application from any source other than FJS. Moreover, every witness (including those of the General Counsel, who testified on point confirmed that all applicants were directed to FJS, and that all applicants were required to register with FJS as a prerequisite to hire. And the three personnel supervisors, Brigham (15:3286, 3293, 3371), Neal (16:3725), and Malone (17:3873, 3890) credibly testified that they did not hire anyone who had not first registered at and been referred by FJS.

Because of all the problems detracting from the integrity of GCX 138b, I attach only limited weight to it, and even then only to the extent that it is consistent with Zurn documents of record, such as the brass logs. On this basis, and crediting the testimony of the three personnel supervisors that they hired no one who had not registered with and been referred by FJS, I find no merit to the Union's contention respecting its Appendix A.

2. Union Appendix B

On Appendix B attached to its brief, the Union lists the names of 20 numbered employees as having been hired before they applied. As an extension of its Appendix A contention, the Union argues (Br. at 49) here that these deviations from Zurn's hiring rules are "further justification for treating the Union's letters of August 25 (GCX 39) and October 12, 1993 (GCX 44), as sufficient for considering the Boilermaker applicants for employment with Zurn/N.E.P.C.O." I find no merit to this argument.

First, even if there were 20 mistakes out of over 900 employees hired at the 3 jobsites, that number of mistakes (about 2 percent) is well within a margin of error allowing for honest mistakes. (I am confident that trial lawyers and surgeons would be delighted to have a success rate of 98 percent!)

Second, once again it is the Union's list which contains errors. Jerry D. Haygood (number 6) apparently was listed because Charging Party's Exhibit 12s shows his application date as April 19, 1993, and his hire date as April 16. (CPX 12s at 89.) But the correct hire date is shown in the Auburndale brass log, and that date is April 19, 1993. (RX 12 at 13, brass 165.)

Brent L. Hennington (number 8) apparently was listed inadvertently, for even Charging Party's Exhibit 12s at 90 shows the application date, at January 5, 1993, to be several months before Hennington's hire date of August 10. Actually, Charging Party's Exhibit 12s probably is in error, with General Counsel's Exhibit 138b, at 37, probably being correct when it shows the appointment date of August 5.

Some names on the list raise the question of relevance even if errors were made. Thus, at most, relevance is de minimis respecting the office clerical Alice Hedden (none of the boilermakers was seeking a typing job or work answering the telephone), the timekeeper Edgar A. Mullins, and those hired as supervisors—Billy Landry (brass 34, RX 14 at 1) and John Padget (brass 52, RX 12 at 1). Mulberry was Landry's eighth jobsite with Zurn. (13:2754, Landry.) He had been a supervisor on previous Zurn jobs, including Bartow, was hired at Mulberry as a foreman, and soon became a general foreman there. (13:2664, 2753; RX 13 at 10, brass 229; GCX 110; CPX 12s at 120.) Recall that October 7, 1994, the date Landry was hired at Mulberry, was Malone's first day on the job there. If Malone, because of the hectic pace engendered by replacing PPE as the contractor, slipped up and took 3 weeks to get an application from Landry, that understandable mistake hardly shows any discrimination either in Zurn's application of its hiring rules or in Zurn's not treating the Union's letters of August 25 and October 12, 1993, as sufficient for "considering the Boilermaker applicants for employment with" Zurn.

As for the others (only nine are pipefitters, pipe welders, ironworkers, or helpers in those classifications), to the extent that General Counsel's Exhibit 138b is complete, it reflects that, most instances, the applicant appeared at FJS before his hire date at Zurn. Because the law does not require perfection, because the number of mistakes was so small as to be irrelevant, and as the credited evidence supports the inference, which I make, that the very few mistakes which did occur were not because of any bad faith, I find no merit to the Union's contention respecting its Appendix B.

3. Union Appendix C

Appendix C is a lengthy list of unnumbered names (and no number given in the Union's brief) showing that the employees applied for one job, such as carpenter foreman, and were hired for another, such as a (journeyman) carpenter, or even that the job applied for was left blank. This proves nothing, and is entirely different from not filing an application for a position which is open. The critical point is that FJS, using its 516 referral card, referred the applicants for one, and only one, specific job opening per application. All this has been summarized earlier. There is no merit to this contention.

4. Union Appendix D

Appendix D, another lengthy list of unnumbered names, shows that 310 (Union's count, Br. at 55) employees were hired after August 23, 1993, who were not prior Zurn employees. The Union's argument here is that the list of 310 invalidates Malone's (purported) testimony (7:1670) that all slots at Auburndale were filled by former Zurn employees (and one referral). In making this contention, the Union distorts Malone's testimony. As I described earlier, Malone actually testified that the two classification (boilermaker and pipefitter) for which Bragan and Juncal applied, from brass 291 until the close of the Auburndale project, were filled by a total of 17 priority hires. (7:1634–1635, 1670; 17:3813–3814.)

The Union's distortion is unpersuasive. As for the list of 310 names, the Union does not pause to show on which project each person worked, or in which classification the worker was hired. The Union's contention is irrelevant absent a new law that prohibits employers, including Zurn, from having recruiting and hiring rules that are applied without unlawful discrimination. The Union's Appendix D contention is without merit.

K. Hiring Policy Allegation Dismissed

To the extent that I have not previously done so, I now dismiss complaint paragraph 13(c) (applying hiring policies so as to avoid hiring union members and union organizers). First, no prima facie case of unlawful motivation was established. Second, the record actually shows that Zurn hires union members and employees who, by written notice to Zurn, have openly declared their intent to organize Zurn's employees. In short, the Government's allegation is without merit.

Third, the cases relied on by the General Counsel and the Union are inapposite respecting their attack on the nature of Zurn's priority hiring system because the cases turned on animus-based motivation. None of the cases stands for the proposition that a priority system, such as Zurn utilizes, is itself discriminatory, or that it becomes discriminatory simply because the "effect" of the policy is that the majority, even the great majority, of those hired will be those who qualify for preference under Zurn's priority hiring policy (because of, for example, many of those hired are from "followings," many others have come off other Zurn projects, and still others have been referred by a Zurn employee or supervisor). The "effect" argument really is the unalleged "inherently destructive" concept by another name.

Fourth, "unlawfully promotes" (GC Br. at 24) is not a category of violation. Zurn's hiring policy, as applied at the three Florida jobsites, was either animus based (or, not alleged or litigated, "inherently destructive"), or it was lawful. Finding no animus, I find that Zurn's application of its priority hiring policy at the three Florida jobsites was lawful. Moreover, the record here does not support any new concept of "unlawfully promotes" (or the alternative concept of inherently destructive), for the evidence demonstrates that union members get hired, and that Zurn even hires known union activists who have declared their intent to organize.

In short, complaint paragraph 13(c) is without merit. Having dismissed all individual allegations of the complaint, I now shall dismiss the complaint in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The complaint is dismissed.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.